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Coming to Terms with its Past—Serbia's New Court for the Prosecution of War Crimes

By
Mark S. Ellis*

INTRODUCTION

In recent years there has been a remarkable change in attitudes and approaches towards holding individuals accountable for gross violations of international law. In national courts, international law cases are often brought with little notoriety outside the country. However, the number of states that have conducted trials against persons accused of international humanitarian crimes is significant. Since 1995, domestic prosecution of international crimes has been conducted in the following countries: Austria, Belgium, Bolivia, Bosnia-Herzegovina, Brazil, Canada, Chile, Colombia, Croatia, Denmark, Ethiopia, Finland, France, Germany, Guatemala, Haiti, Indonesia, Israel, Italy, Japan, Latvia, Lithuania, the Netherlands, Romania, Russia, Rwanda, Sweden, Switzerland and the United Kingdom.[1] The experience of these and other countries in conducting war crimes trials provides valuable insight into the challenges and difficulties of pursuing a policy of accountability for the sake of obtaining justice.

Although domestic war crimes courts can operate successfully under particular conditions, they demand special attention and provide unique challenges.[2] In general, the investigation and prosecution of war crimes are complicated and problematic. Atrocities are often not recorded. On-site investigations are frequently infeasible, and there are limited options for gathering evidence through requests for mutual assistance. Moreover, governments may have an interest in providing biased information on their own officials. Witnesses must be found and be willing to make incriminating statements, even though many will be intimidated or threatened with reprisal. And even witnesses who want to testify may be unable to give accurate statements. Further, the lapse of time may have

* Mark S. Ellis is the Executive Director of the International Bar Association in London, England. The author would like to thank Takhmina Karimova and Jennifer Paterson for providing excellent research for this article.

1. *See* Prevent Genocide International, http://www.preventgenocide.org/punish/domestic (last updated Jul. 21, 2003).

2. *See, e.g.*, Citizenship and Immigration Canada, Fifth Annual Report: Crimes Against Humanity and War Crimes, 2001-2002, *at* http://www.cic.gc.ca/english/pub/war2002/section04.html (last visited Apr. 16, 2004) (containing statements made by the Dutch Government in 2002 regarding its own experience with conducting war crimes investigations and trials).

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an impact on a person's recollection so that even witnesses who are willing to testify may be unable to give accurate statements.

Serbia presents an example of how the attempt to try war criminals domestically can sometimes have less than ideal results. By January 2003, only four domestic war crimes trials had taken place, although war crimes trials commenced in October 2000 after Yugoslav President Slobodan Milosevic was transferred to the International Criminal Tribunal for the former Yugoslavia (ICTY).[3]

Because the ICTY only has jurisdiction over crimes committed in the former Yugoslavia until 2008,[4] the Organization for Security and Cooperation in Europe (OSCE) felt it was incumbent on Serbia to increase significantly its capacity to undertake domestic war crimes trials. Despite the difficulties associated with domestic war crimes trials, the OSCE determined that one of its main priorities in 2003 would be to assist the Serbian Government in creating the capacity for the national judiciary to conduct war crimes trials.[5]

While, initially, it appeared that Serbia lacked the political will to prosecute war crimes, this perception changed when the Serbian government announced its willingness to draft new war crimes legislation. The government's first attempt to draft a new law was hampered by its desire to complete the task in one week and its failure to incorporate insight and assistance from the international community. As a result, the Law on Organisation and Jurisdiction of Government Authorities in Prosecuting Persons Guilty of War Crimes (the "Draft Law")[6] had significant weaknesses in areas such as the elements of the offenses, jurisdictional issues, immunity, communal responsibility, evidence, witness protection, sentencing, selection criteria for judges and prosecutors, and a host of other issues discussed in this article.

At the urging of the OSCE, the Serbian government extended the time to draft the proposed law. During the next ten days, the International Bar Association's (IBA) group of international experts[7] ("international experts") reviewed

3. Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), *in Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704 (1993) [hereinafter ICTY Statute]. The Secretary General's Report containing the statute was affirmed by S.C. Res. 827, U.N. SCOR, 48th Year., Res. & Dec., at 29, U.N. Doc. S/INF/49 (*adopted* 1993). It is available in its current, amended form at the website of the Tribunal. *See* http://www.un.org/icty/legaldoc/index.htm (*last amended* Nov., 2003).

4. The ICTY has established an 'exit strategy' by which it will close its investigations by 2004 and the trials of all penalty cases by 2008-2010.

5. OSCE Mission to Serbia and Montenegro: Strategy Paper, On Support to the National Judiciary in Conducting War Crimes Trials, (Apr. 11, 2003) (on file with author).

6. (On file with author) [hereinafter Draft Law].

7. The IBA team of international experts included: Stuart Alford, Barrister in London; Professor Diane Amann, Professor of Law at the University of California-Davis School of Law; Sylvia de Bertodano, Barrister in London; Professor Bartram Brown, Professor of Law at the Chicago-Kent College of Law; Antonio Cassese, Judge (1993-2000) and President (1993-1997) of the UN International Criminal Tribunal for the former Yugoslavia; Jonathan Cedarbaum, Deputy Chef de Cabinet, Office of the President, International Criminal Tribunal for the former Yugoslavia; Mark Ellis, Executive Director of the International Bar Association (IBA); Professor Geoffrey Gilbert, Professor and Head of the Department of Law at the University of Essex; Justice Richard J Goldstone, a justice of the Constitutional Court of South Africa and the first Chief Prosecutor of the United Nations Inter-

the Draft Law, and the IBA office in London created an analysis for the Serbian government.[8] This was followed by a two-day specialized workshop where members of the IBA team and representatives of the Serbian government, the OSCE and Serbian non-government organizations discussed all aspects of the Draft Law and the recommendations presented in the analysis by the international experts. The results of the exercise were quite extraordinary: by the end of the workshop, the Serbian government had agreed to substantial changes to the Draft Law. As a result, the Law on Organisation and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes (the "Final Law")[9] reflected the views of the international community and established a foundation for future domestic war crimes trials in Serbia.

The failures alluded to above continue to raise some concerns with the Final Law. These concerns include serious omissions in the list of offenses, the failure to make specific reference to command responsibility, the absence of any language that denies statutory or other limitations to the prosecution and punishment of crimes, the decision not to include a provision that would prevent granting of immunity, and others. The government must resolve these issues in order for the new court to be effective.

This article provides an in-depth review of the process followed in creating Serbia's law on domestic war crimes trials. It compares and contrasts the Draft Law with the Final Law, and identifies areas that remain a concern for undertaking domestic war crimes trials in Serbia.

I.
CREATING A NEW WAR CRIMES COURT

The OSCE's first step was to commission an assessment of the state of the judiciary and identify areas that needed restructuring in order for Serbia to conduct domestic war crimes trials. The assessment was conducted during April 13-18, 2003.[10]

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national Criminal Tribunals for the former Yugoslavia and Rwanda; Natasa Kandic, Founder and Executive Director of the Humanitarian Law Centre in Belgrade; Susan Lamb, Legal Adviser in the Office of the Prosecutor at the International Criminal Tribunal for the former Yugoslavia; Justice Finn Lynghjem, Judge of the Sunmore District Court, Norway; Professor William Schabas, Director of the Irish Centre for Human Rights at the National University of Ireland; Professor Michael Scharf, Professor of Law and Director of the Frederick K. Cox International Law Center at Case Western Reserve University School of Law in Cleveland, Ohio; Sead Spahovic, Public Attorney of the Republic of Serbia; David Tolbert, Executive Director of the Central and East European Law Initiative (CEELI) for the American Bar Association, Senior Legal Adviser at the International Criminal Tribunal for the former Yugoslavia and previously Chef de Cabinet to President Gabrielle Kirk McDonald; Elizabeth Santalla Vargas, Associate Legal Officer at the Registry Advisory Section of the International Criminal Tribunal for the former Yugoslavia; Professor Paul Williams, Rebecca Grazier Professorship in Law and International Relations at the American University; Joanna Salsbury, Lawyer, IBA Human Rights Institute; Phillip Tahmindjis, Programme Lawyer, IBA.

8. *See* Report, International Bar Association, Analysis of the Republic of Serbia's Proposed Law on the Prosecution of War Crimes (May 2003) (on file with author).

9. (Jul. 7, 2003) (translated by OSCE Mission to FRY), *at* http://www.osce.org/documents/fry/2003/07/446_en.pdf [hereinafter Final Law].

10. The OSCE selected the author to conduct the assessment.

The assessment report found that the courts in Serbia did not have the capacity to carry out the large number of potential war crimes trials that would account for the atrocities committed in the former Yugoslavia during 1993-1999.[11] Nor could Serbia guarantee that these trials would be conducted consistent with international standards for fair trials.[12]

The assessment report concluded that domestic war crimes trials are very costly in terms of judicial time because of other special requirements such as security records, evidence management and witness protection costs. Thus, it was important not to overwhelm the already weak court system with the complications of domestic war crimes trials.

However, the report found that the most serious deterrent to undertaking domestic war crimes trials was the lack of political will. Through extensive interviews conducted during the assessment, it became clear that the political will to aggressively adjudicate alleged war criminals simply did not exist in Serbia. Individuals in Serbia do not see any reason why local citizens accused of war crimes should be held accountable because, in the eyes of many individuals, these citizens remain heroes.[13]

This sentiment was recently manifested on June 13, 2003, when former Yugoslav army colonel Veselin Sljivancanin was arrested in Belgrade for extradition to the ICTY. The colonel, one of the top war crimes suspects, was indicted by the ICTY for his role in the massacre of approximately 200 Croatian civilians during a night of battle in 1991.[14] Sljivancanin was taken into custody only after a ten-hour siege during which time hundreds of Serbs violently protested the arrest.[15] In scenes reminiscent of the arrest of Yugoslav President Slobodan Milosevic, the demonstrators attacked the police and set streets ablaze.[16]

Given these circumstances, the OSCE knew its task would be enormous. Creating a mechanism to conduct domestic war crimes trials would be extraordinarily challenging and would require a long term commitment by the Serbian government accompanied by substantial resources and unwavering political will on the part of the citizens of the country.

The critical element of political will came in an unexpected announcement by the government during the assessment visit. The breakthrough came when the Minister of Justice stated that he would support the drafting of a new law creating a special War Crimes Court. This was a significant reversal of an ear-

11. *See* Mission Report on Proposed Domestic War Crimes Trials for Serbia and Montenegro, Memorandum from Mark Ellis, Executive Director, IBA, to Ljiljana Hellman, National Legal Advisor, OSCE (Apr. 25, 2003) (on file with the author) [hereinafter Mission Report].

12. *Id.*

13. Opinion expressed to the author by a number of interviewees during the assessment visit to Belgrade in April 2003. *See id.*

14. The Prosecutor v. Mrksic, Radic, Sljivancanin, and Dokmanovic, Amended Indictment, Case No.: IT-95-13a-I (Dec. 2, 1997), *available at* http://www.un.org/icty/indictment/english/mrk-2ai1971202e.pdf.

15. Dejan Anastasijevic, *World Watch: Riot Acts*, TIME EUROPE, Jun. 15, 2003, *available at* http://www.time.com/time/europe/magazine/article/0,13005,901030623-458735,00.html.

16. *Id.*

lier decision to "fold" war crimes atrocities into the Law on the Suppression of Organised Crime.[17] The existing law had drastically weakened the government's commitment to conduct domestic war crimes trials. It failed to provide sufficient independence for both the prosecutor and the investigative unit for war crimes. For instance, under this Law, the prosecutor for the War Crimes Court would have to gain written approval from the Republic Public Prosecutor prior to pursuing a case.[18]

Despite the positive development of drafting a new law, a major problem arose during the assessment visit. The Minister of Justice announced that he was going to draft the new law and submit it to Parliament within the following week. He further explained that there was a "window of opportunity" to draft a separate law on domestic war crimes prosecution.[19] However, the OSCE was concerned that there was a major risk in rushing through the promulgation of such an important law. Therefore, the assessment report recommended that the drafting process be extended by at least two weeks and that the Minister of Justice incorporate the views of international experts.

This proposed delay did not receive universal support. The U.S. Embassy, which was playing a major role in supporting domestic war crimes trials,[20] was concerned that if the international community did not move immediately, the opportunity to create an independent war crimes court for Serbia would be lost.[21] The U.S. Embassy believed that there were "political enemies" who were against the creation of the new court:[22]

After a series of urgent meetings between the U.S. Embassy, the OSCE and the author, it was agreed that the IBA would assemble a team of experts who would quickly review and provide the Serbian government with an assessment of the Draft Law.[23]

II.
DEFINITION OF CRIMES

The initial step in evaluating the Draft Law was to examine the list of substantive crimes and determine what changes needed to be made. The Draft Law set out specific criminal offences that would be prosecuted by the new War Crimes Court, including the following:

- genocide

17. *See* Law on Organisation and Jurisdiction of Government Authorities in the Suppression of Organised Crime, Official Gazette of the Republic of Serbia, No. 42/02, (July 22, 2002) (translated by OSCE Mission to FRY), *available at* http://www.osce.org/documents/fry/2002/07/127_en.pdf.

18. *Id.*, art. 6.

19. Interview with Dr. Valdin Batic, Serbian Minister of Justice in Belgrade (April 15, 2003).

20. The U.S. Embassy had already funded two large assessment missions to Serbia with the purpose of designing a multi-million dollar assistance program for domestic war crimes trials. *See* Draft of the U.S. Embassy War Crimes Capacity Development Strategy (Feb. 14, 2003) (on file with author).

21. These comments were expressed by U.S. Ambassador William Montgomery in discussions with the author on April 15, 2003.

22. *Id.*

23. *See* Draft Law, *supra* note 6.

- war crimes against the civilian population
- war crimes against the wounded and sick
- war crimes against prisoners of war
- organising a group and instigating the commission of genocide and war crimes
- unlawful killing or wounding of the enemy
- employing forbidden means of warfare
- injury to persons bearing a flag of truce
- cruel treatment of the wounded, sick and prisoners of war
- unjustified delay of repatriation of prisoners of war
- destruction of cultural and historic monuments
- instigating a war of aggression
- making improper use of international emblems.[24]

These crimes are stipulated in Articles 141-153 of the Criminal Code of the former Yugoslavia (the "Criminal Code").[25] However, with the exception of a few amendments in 1990, the Criminal Code does not incorporate the major developments in international criminal law from the last 25 years.[26]

For example, it does not fully incorporate the "other acts" provision included in Article 3 of the 1948 Genocide Convention or Article 4 of the ICTY Statute prohibiting genocide.[27] Nor is there a specific provision in the Criminal Code regarding crimes against humanity.[28] Without jurisdiction over crimes against humanity, it is doubtful that a War Crimes Court can be successful in bringing about convictions. Also absent from the Criminal Code is language that would clarify individual criminal responsibility such as prohibiting acts that would aid, abet or otherwise assist in the commission of a crime.[29]

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24. Draft Law, *supra* note 6, art. 2.

25. Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY), Official Gazette No. 36 (1977), *available at* http://pbosnia.kentlaw.edu/resources/legal/bosnia/criminalcode_fry,htm [hereinafter Criminal Code].

26. These Articles were formulated in 1951, incorporating what was at that time groundbreaking advances in international criminal law—the Geneva Conventions and the 1948 Genocide Convention. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Conventions, Aug. 12, 1949, Protocol I, Dec. 12, 1977, 1125 U.N.T.S. 3; Geneva Conventions, Aug. 12, 1949, Protocol I, Dec. 12, 1977, 1125 U.N.T.S. 609; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

27. *See* Criminal Code, *supra* note 25; *see also* ICTY Statute, *supra* note 3, art. 4; Genocide Convention, *supra* note 26, arts. 3-4.

28. *See* Criminal Code, *supra* note 25.

29. For instance, Article 25 of the International Criminal Court Statute reads, in part:

> in accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
> (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
> (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

In order to compensate for these deficiencies, the international experts wanted the Draft Law to make specific reference to the relevant conventions and the statutes and decisions of the ICTY, the International Criminal Tribunal for Rwanda (ICTR)[30] and the International Criminal Court (ICC).[31] This would "internationalize" the Criminal Code and the new War Crimes Court. The international experts also suggested that the entire chapter of the Criminal Code dealing with "Criminal Acts against Humanity and International Law" should be included in the Draft Law.[32] The inclusion of the additional crimes under Chapter 16 of the Criminal Code would capture *any* violation of basic human rights and freedoms based on race, color, nationality or ethnicity.[33] This, in turn, could help to establish a specific reference to elements of crimes that could be viewed as "crimes against humanity."[34]

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide.

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9, *corrected* Nov. 10, 1998, and July 12, 1999, *available at* http://www.un.org/law/icc/index.html, *reprinted in* 37 ILM 999 (1998) (uncorrected version) (entered into force Jul. 1, 2002) [hereinafter ICC Statute].

30. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955: Annex art. 1, U.N. SCOR, 49th Year, Res. and Dec. at 15, U.N. Doc. S/INF/50 (*adopted* 1994), *available at* http://www.ictr.org/ENGLISH/basicdocs/statute.html [hereinafter ICTR Statute].

31. ICC Statute, *supra* note 29.

32. Chapter 16 of the Criminal Code, *supra* note 25, covers the following crimes: genocide, war crimes against the civilian population, war crimes against the wounded and sick, war crimes against prisoners of war, organising a group and instigating the commission of genocide and war crimes, unlawful killing or wounding of the enemy, marauding, making use of forbidden means of warfare, violating the protection granted to bearers of flags of truce, cruel treatment of the wounded, sick and prisoners of war, destruction of cultural and historical monuments, instigating an aggressive war, misuse of international emblems, racial and other discrimination, establishing slavery relations and transporting people in slavery relation, and imposing the punishment of confiscation of property.

33. Article 154 of the Criminal Code, *supra* note 25, reads:

(1) Whoever on the basis of distinction of race, colour, nationality or ethnic background violates basic human rights and freedoms recognized by the international community, shall be punished by imprisonment for a term exceeding six months but not exceeding five years.

(2) The sentence set forth in paragraph 1 of this article shall be imposed on those who persecute organizations or individuals for their advocating equality among the people.

(3) Whoever spreads ideas on the superiority of one race over another, or advocates racial hatred, or instigates racial discrimination, shall be punished by imprisonment for a term exceeding three months but not exceeding three years.

34. The international experts suggested the following language: "where a crime under the basic Criminal Code forms part of a widespread or systematic attack on a civilian population in a time of peace or armed conflict, it will be dealt with under the procedures of the Statute."

While the Serbian government did not include any reference to the ICTY, the ICTR, or the ICC for the retroactive application of crimes, the Serbian government fortunately chose to incorporate *all* the crimes under Chapter 16 of the Criminal Code into the Final Law. By incorporating these crimes into the Final Law, the government believes that it will be able to try an individual retroactively for any and all crimes that fall under the statutes of the ICTY and the ICC, including crimes against humanity. The Serbian government's position is that its current Criminal Code incorporates all the necessary elements of international humanitarian law and that any reference to the ICTY, ICTR, or ICC is unnecessary even though the language in the Criminal Code seems ambiguous.

Despite the broad reference to provisions in the Criminal Code, the Final Law is still flawed. For example, Articles 142, 143, 144 and 146[35] of the Criminal Code refer to "war or armed conflict" or "prisoners of war." However, the nexus to a war or armed conflict no longer applies for international crimes considered under customary international law, such as crimes against humanity.[36] For example, under Article 7 of the ICC Statute, "crimes against humanity" means one of several enumerated attacks "committed as part of a widespread or systematic attack directed against any civilian population."[37] Thus, the definition of crimes against humanity includes acts both during wartime and peacetime. Although the new War Crimes Court will address crimes committed during armed conflict in the former Yugoslavia, the Court may still be more constrained in interpreting the Criminal Code as addressing past acts than it would have been under either customary international law or the definitions of Article 7 of the ICC Statute.

These same concerns will not pertain to prospective cases. The Serbian government added substantial language in the Final Law to ensure that crimes against humanity will be clearly embedded in Serbian law. Article 1 of the Final Law reads:

> This Law shall also apply in detecting and prosecuting perpetrators of criminal offences stipulated in Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia.[38]

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35. *See* Criminal Code, *supra* note 25.

36. *See* The Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction 1995 ICTY (Appeals Chamber), para. 141 (Oct. 2, 1995) *available at* http://www.un.org/icty/tadic/appeal/decision-e/51002.htm.

37. ICC Statute, *supra* note 29.

38. Article 5 of the ICTY Statute, *supra* note 3, reads:

> The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
> (a) murder;
> (b) extermination;
> (c) enslavement;
> (d) deportation;
> (e) imprisonment;
> (f) torture;
> (g) rape;
> (h) persecutions on political, racial and religious grounds;
> (i) other inhumane acts.

Another important omission in the Criminal Code, and thus in the Final Law, is any reference to the prevention of births within a particular group. The Genocide Convention, as well as the ICTY, ICTR and ICC Statutes include under the definition of genocide any act "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group" including "imposing measures intended to prevent births within the group."[39] In the ICTR, the trial court ruled that rape could be interpreted as "imposing conditions intended to prevent births."[40] The court concluded that measures intended to prevent births can be physical as well as mental. A woman, who is raped and subsequently refuses to procreate, suffers in a similar way to a woman who is physically prevented from giving birth according to the court.[41] In an important case before the ICTY, the court ruled that the systematic rape of women, intended to transmit a new ethnic identity to the child, could constitute genocide.[42] Reference to the ICTR/ICTY case law or ICC Statute in the Final Law could have easily solved this omission.

Serbia also chose to go against the consensus of the international experts when it decided to include the crime of aggression in its Final Law. Both the ICTY and ICTR exclude the crime of aggression from their respective statutes and, during the consultation, the international experts suggested that war crimes trials for the crime of aggression can be unfair because there is currently no accepted definition of the crime of aggression under international law. Consequently, its definition is more political than legal. Nevertheless, the Final Law refers to all the "main" crimes in the Serbia Criminal Code, which include the crime of aggression.[43]

While the Final Law is flawed, the provisions contained in it are adequate to prosecute and punish past violators of international law, particularly humanitarian law. However, in order for this to be done, the stakeholders in the new legislation (judges, prosecutors and defense lawyers) must be thoroughly trained to interpret Serbia's Criminal Code and Constitution "aggressively," incorporating existing international standards and humanitarian law into domestic law.[44] Time will tell whether the Serbian government's belief is correct that, despite important omissions, the Final Law will be effective.

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39. *See* ICC Statute, *supra* note 29, art. 6; ICTY Statute, *supra* note 3, art. 4; ICTR Statute *supra* note 30, art. 2; Genocide Convention, *supra* note 26, art. II.

40. *See* The Prosecutor v. Kayishema and Ruzindana, Sentencing Decision Case No. ICTR 95-1-T (May 21, 1999); The Prosecutor v. Akayesu, Sentencing Decision, Case No. ICTR 96-4-T (Oct. 2, 1998).

41. The Prosecutor v. Akayesu, Judgment, Case No. ICTR 96-4-T , para. 508 (Oct. 2, 1998).

42. *See* The Prosecutor v. Karadzic and Mlalic, Indictment, Case No. IT-95-18-I (Nov. 16, 1995) *avialable at* http://www.un.org/icty/indictment/english/kar-ii951116e.htm; The Prosecutor v. Karadzic and Mladic, Decisions of the Appeal and Trial Chambers, Case No. IT-95-5-D, (May 16, 1995), *available at* http://www.un.org/icty/karadzic& mladic/trialc/decision-e/50516DF1.htm.

43. *See* Criminal Code, *supra* note 25.

44. Article 2 of the Final Law, *supra* note 9, now reads: "This Law shall apply in detecting and prosecuting perpetrators of criminal offences stipulated in Chapter XVI of the Basic Criminal Code (Criminal offences against humanity and international law.)"

III.
COMMAND RESPONSIBILITY

One of the most contentious issues debated during the process of creating the new War Crimes Court was whether there should be express recognition in the Draft Law of the applicability of command responsibility.

Command responsibility incorporates two separate concepts of criminal responsibility: direct responsibility and imputed responsibility. Under the concept of direct responsibility, the commander or superior officer takes responsibility only for those unlawful acts that he committed or ordered.[45] The ICTY Statute codifies direct responsibility in the following way: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime."[46] Imputed responsibility is where the commander or superior *failed* to act.[47] The ICC Statute recognizes imputed command responsibility in the following way:

> 1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
>
> (a) That military commander or person either knew or, owing to the circumstance at the time, should have known that the forces were committing or about to commit such crimes; and
>
> (b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
>
> 2. With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
>
> (a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
>
> (b) The crimes concerned activities that were within the effective responsibility and control of the superior; and
>
> (c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[48]

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45. *See* The Prosecutor v. Delalic, Transcript, Case No. IT-96-21, at 789 (Feb. 20, 2001), *available at* http://www.un.org/icty/transe21/010220it.htm ("The Appeals Chamber has also confirmed that the Prosecution does not have to establish that a person is in a position of superior authority before he can be found guilty of direct responsibility for this offence under Article 7.1 of the Statute"); ICTY Statute, *supra* note 3, art. 7(1).

46. ICTY Statute, *supra* note 3, art. 7(1).

47. *See* The Prosecutor v. Kordic and Cerkez, Decision On The Joint Defence Motion To Dismiss For Lack Of Jurisdiction Portions Of The Amended Indictment Alleging "Failure To Punish" Liability, Case No. IT-95-14/2, (Mar. 2, 1999), *available at* http://www.un.org/icty/kordic/trialc/decision-e/90302DC56321.htm.

48. ICC Statute, *supra* note 29, art. 28.

The international experts wanted to include a specific reference to command responsibility in the Draft Law. They suggested the following language:

> In addition to other grounds of criminal responsibility under the Criminal Code:
>
> A military commander or person effectively acting as a military commander shall be criminally responsible for crimes enumerated under Article 2 of the Serbian War Crimes Law committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
>
> (1) that military commander or person either knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
>
> (2) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[49]

The Serbian government resisted this suggestion. Government officials argued that Article 14 of the existing Criminal Code regarding negligence already incorporated the concept of command responsibility into Serbian law. Article 14 reads as follows:

> A criminal act is committed negligently when the offender is conscious that a prohibited consequence may occur but carelessly assumes that it will not occur or that he will be able to avert it; or when he was unaware of the possibility that a prohibited consequence might occur although, under the circumstances and by his personal characteristics, he should and could have been aware of this possibility.[50]

The main fear expressed by the Serbian government officials was that by including a specific reference to command responsibility in the Draft Law, one could argue that this particular provision was retroactive and, therefore, illegal under the principle of *nullum crimen sine lege* (no crime without law).[51] The principle counsels against prosecuting individuals for crimes that were not prohibited at the time of their occurrence. This concept is fundamental to the principle of legality. Since the Criminal Code prohibits the retroactive application of criminal law, the Serbian officials wanted to be certain that they were not legislating *ex post facto* the concept of command responsibility.[52] The solution, according to the Serbian side of the "debate," was to train the judges and prosecutors to actively apply and interpret the existing Criminal Code as if it already incorporated the concept of command responsibility. Ultimately, the Final Law did not incorporate specific language regarding command responsibility, which will test the viability of the new War Crimes Court. If the Court is unable to prosecute individuals under the concept of command responsibility, it is doubtful that it will be effective.

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49. *See* Mission Report, *supra* note 11.

50. Criminal Code, *supra* note 25, art. 14.

51. For general discussion, *see* M. CHERIF BASSIOUNI AND PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 265 (1996).

52. Criminal Code, *supra* note 25, art. 3.

IV.
SUPERIOR ORDERS DEFENSE

The statutes of both the ICTY and ICTR explicitly exclude the defense of "superior orders" from the litigation part of the trial.[53] This defense, under which a subordinate who committed a crime can escape responsibility because he was following the orders of his superior, has been rejected since the Nuremberg trials.[54] In contrast to the ICTR and ICTY, the ICC does permit the use of the defense, in a diluted form, at trial. Article 33 of the ICC Statute reads:

> (1) The fact that a crime within the jurisdiction of the court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
>
> (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
>
> (b) The person did not know that the order was unlawful; and
>
> (c) The order was not manifestly unlawful.
>
> (2) For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.[55]

The international experts were concerned that the Draft Law made no clear reference to the concept of superior orders because they felt that the ambiguities in the Criminal Code could not control the issue. As is, the Criminal Code recognizes the standard defenses in criminal cases, such as temporary insanity, intoxication and other common defenses.[56] These standard defenses mirror those in the ICC Statute.[57] The Criminal Code also exonerates a person's con-

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53. *See* ICTY Statute, *supra* note 3, art. 7(4); ICTR Statute, *supra* note 30, art 6(4). As with the Nuremberg trials, the courts in Yugoslavia and Rwanda consider the "superior orders defense" only as a mitigating factor in the sentencing stage.

54. Article 8 of the Nuremberg Charter reads: "The fact that the defendant acted pursuant to orders of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment, if the Tribunal determines that justice so requires." Charter of the International Military Tribunal, *in* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), August 8, 1945, art. 8, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280.

55. *See* ICC Statute, *supra* note 29, art. 33.

56. Article 12 of the Criminal Code, *supra* note 25, reads:

> (1) A person who committed a criminal act is not considered responsible if at the time of the commission of a criminal act he was incapable of understanding the significance of his act or control his conduct due to a lasting or temporary mental disease, temporary mental disturbance, or mental retardation. (no responsibility).
>
> (2) If due to one of the states referred to in paragraph 1 of this article, the capacity of the offender to understand the significance of his act or his ability to control his conduct was substantially reduced, the court may impose a reduced punishment on him. (Materially reduced responsibility).
>
> (3) The offender shall be criminally liable if, by indulgence in alcohol, drugs or in some other way, he has placed himself in a state in which he has not been capable of understanding the importance of his actions or controlling his conduct, and if prior to his placing himself in such a state, the act was premeditated or if he was negligent in relation to the criminal act, insofar, as the act in question is punishable by law if committed negligently.

57. Article 31 of the ICC Statute, *supra* note 29, reads, in part:

> "1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

duct if, at the time of committing the criminal act, he was not aware of some statutory element of the act or he mistakenly believed that circumstances existed that would render such an act permissible.[58] In addition, a Serbian court can also reduce the punishment of a defendant who had "justifiable cause for not knowing that his conduct was prohibited."[59] The international experts were adamant that the Criminal Code could still be construed to permit a superior orders defense, which, in their view, was an undesirable possibility.

The international experts felt strongly that the Draft Law should be amended to add language that was consistent with the language of the ICTY and the ICTR Statutes rather than the "watered down" language of the ICC Statute. The experts suggested the following language during the drafting workshop:

> The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Court determines that justice so requires.[60]

In the end, the Serbian government representatives did not include any specific language regarding superior orders in the Final Law. Therefore, the Serbian Criminal Code governs on this point and, thus, it is uncertain whether the War Crimes Court will interpret Serbia's new Criminal Code to prohibit such defenses without specific language regarding superior orders in the Final Law. As for future cases, it would be advisable for Serbia to amend its laws clearly to prohibit a superior orders defense.

V.
STATUTE OF LIMITATIONS

During the drafting workshop the parties discussed the issue of statute of limitations. Although it is difficult to argue that customary international law prohibits statutory limitations for all international crimes, it does prohibit their application in cases of gross violation of international humanitarian law.[61] The

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(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court."

58. *See* Criminal Code, *supra* note 25, art. 16(1).

59. *Id.* art. 17.

60. Mission Report, *supra* note 11.

61. *See* Convention on the Non-applicability of Statutory Limitations to War Crimes Against Humanity, G.A. Res. 2391 (XXIII), Annex, U.N. GAOR, 23rd Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968); European Convention on the Non-applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, Jan. 25, 1974, Europ. T.S. No. 82; *Extradition and Punishment of War Criminals*, G.A. Res. 3 (I), U.N. GAOR, 1st Sess., at 9, U.N. Doc. A/64 (1946); *Surrender of War Criminals and Traitors*, G.A. Res. 170 (III), U.N. GAOR, 2d Sess., at 102, U.N. Doc. A/519 (1948); *Affirmation of the Principles of International Law recognized by the Charter of the Nüremberg Tribunal*, G.A. Res. 95 (I), U.N. GAOR, 1st Sess., pt 2, at 188, U.N. Doc. A/64/Add. 1 (1947);

international experts suggested that the Draft Law be amended to include language that "no statutory or other limitations shall apply to the prosecution and punishment of the crimes referred to in Article 2 of the Law."[62] This is similar to the language found in the ICC Statute.[63]

The Serbian government representatives rejected the suggested language. Their main argument was that its applicability, irrespective of the date of the crime, would violate the principle of non-retroactivity. However, considering that customary international law prohibited statutory limitations for serious war crimes[64] long before the conflict in Yugoslavia, Serbia should not be concerned about the issue of non-retroactivity.

VI.
IMMUNITY

The international experts were also concerned because the Draft Law was silent on the issue of immunity. In particular, it failed to specify that there should be no immunity for war crimes based on an individual's official position. As a member of the ICC, the international experts felt that the omission would be inconsistent with Serbia's international obligations. Also, by explicitly prohibiting such a defense in the Final Law, Serbia would prevent similar crimes from being repeated.[65]

Under the ICC Statute, blanket amnesties may not be granted. Article 27 of the ICC Statute states that the official capacity of an individual cannot shield that person from criminal responsibility and cannot be considered as a ground for mitigating the sentence. Article 27 reads:

> The statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.[66]

However, the opportunity to grant pardons after the issuance of a state court conviction is still an open question.[67] State officials may enjoy immunity under their own national laws, which can often be *ratione materiae* or *ratione per-*

Question of Territories under Portuguese Administration, G.A. Res. 2184 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 70, U.N. Doc. A/6316 (1967); *The Policies of Apartheid of the Government of the Republic of South Africa*, G.A. Res. 2202 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 20, U.N. Doc. A/6316 (1967).

62. Mission Report, *supra* note 11.

63. Article 29 of the ICC Statute, *supra* note 29, states: "The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations."

64. *See*, THE ROME STATUTE FOR AN INTERNATIONAL CRIMINAL COURT: A COMMENTARY 882 (Antonio Cassese et al. eds., 2002).

65. *See* ICC Statute, *supra* note 29, pmbl.

66. ICC Statute, *supra* note 29, art. 27.

67. In addition to Article 27 of the ICC Statute, the ICTY Statute similarly reads: "The official position of any accused person, whether as Head of State of Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment." *See* ICTY Statute, *supra* note 3, art. 7(2); ICC Statute, *supra* note 29, art. 27(1).

sonae.[68] However, Article 27 of the ICC Statute clearly refers to immunities *ratione materiae*.[69] Thus, the statute empowers the ICC to obtain jurisdiction over any official who was provided immunity by a national court. This right comes under Article 27(2) which reads:

> Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.[70]

It is likely that the ICC would view the state-granted immunity as a way of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the ICC.[71]

The international experts were clear that the Final Law should include language mirroring that of the ICC Statute, and thereby put an end to impunity for the perpetrators of gross violations of international humanitarian law. As a State Party to the ICC, Serbia must alter its legislation and constitution to eliminate immunities attached to state officials. Serbia is duty-bound to ensure that its national law allows for full co-operation with the ICC.[72]

The Final Law, however, did not include a provision dealing with immunity. Failure to do so could place Serbia in direct confrontation with the ICC Statute. In addition, any action by Serbia or the new court that would give immunity to an official for past acts would immediately destroy any credibility associated with the new court.

VII.
THE PROSECUTOR

There is no single position in the new War Crimes Court more important than that of the prosecutor. The prosecutor must be independent, impartial, properly trained and appointed on the basis of skill and experience. In reviewing the Draft Law, Justice Richard Goldstone, the first Prosecutor of the ICTY, stated that the credibility of the Prosecutor for War Crimes is essential for the success of his or her office.[73] Likewise, there has to be confidence that he or she is not taking political decisions from a member of the public or the execu-

68. Immunity *ratione materiae* relates to acts carried out in the person's official capacity and such immunity from prosecution continues after the person leaves office. Immunity *ratione persoae* is a procedural bar which prohibits prosecution of high state officials, for any act, during their term in office. Prosecution for those acts may occur, after the end of their official duties. *See generally* Steffen Wirth, *Immunity for Core Crimes? The ICJ's Judgment in the* Congo v. Belgium *Case*, 13 EUR. J. INT'L L. 877 (2002).

69. *See* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, *supra* note 64, at 978.

70. ICC Statute, *supra* note 29, art. 27(2).

71. *See* ICC Statute, *supra* note 29, art. 20(3)(a).

72. Article 88 of the ICC Statute, *supra* note 29, reads: "State Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part."

73. *See* Memorandum on the Draft Law on Organisation and Jurisdiction of Government Authorities in Prosecuting Persons Guilty of War Crimes, Memorandum from Justice Goldstone to Mark Ellis, Executive Director of IBA (Mar. 15, 2000) (on file with author).

tive.[74] Under the Draft Law, the international experts were concerned that the National Assembly could elect a prosecutor who did not have a high standing in the legal community. There was no mention in the Draft Law about the standards and criteria by which the prosecutor may be selected and appointed. During the drafting workshop, the international experts suggested that the following language be added to the Draft Law:

> In electing the Prosecutor for War Crimes and Genocide [or the Deputy Prosecutor for War Crimes and Genocide] [in assigning the Judges to the War Crimes and Genocide Panels] the National Assembly [the President of the Court] shall select persons of high moral character and recognised impartiality and integrity, with experience in criminal law. Priority shall be given to persons who, in addition, have competence or experience in international humanitarian law and human rights law.[75]

To the credit of the Serbian Government, the Final Law incorporated language that emphasized the importance of selecting the highest caliber of individual for the post of prosecutor. The new language reads:

> A person may be elected Prosecutor for War Crimes or appointed as his/her Deputy who meets the requirements for election as district public prosecutor and shall be of high moral character and impartiality, with considerable experience in criminal law. Priority in election and/or appointment shall be given to persons who have competence and experience in international humanitarian law and human rights law.[76]

The Prosecutor for War Crimes is elected for a term of four years and may be re-elected.[77] The Deputy Prosecutor for War Crimes is appointed for a term of four years and may be re-appointed.[78]

The international experts were also concerned that the Draft Law did not promote a transparent and impartial process for the new prosecutor to decide when to initiate a case so they suggested a set of guidelines to shape and constrain the prosecutor's decision-making. The international experts recommended the following amendments to the Draft Law:

> The Office of the Prosecutor for War Crimes should exercise its discretion to bring only those charges which it considers to be consistent with the interests of justice. Factors which will be considered are:
>
> (1) The nature and seriousness of the offence, particularly with regard to the immediate harm caused by the offence;
>
> (2) The role of the person in the offence, particularly that he or she occupied a leadership role in the direct commission of an offence;
>
> (3) The strength of the case against the person;
>
> (4) The interests of the victims;
>
> (5) The age and physical and mental condition of the person; and

74. *Id.*

75. Mission Report, *supra* note 11.

76. Final Law, *supra* note 9, art. 5.

77. On July 22, 2003, the Serbian Parliament approved the appointment of Vladimir Vukcevk as the Prosecutor for the new War Crimes Court. Mr. Vukcevk was the only candidate for the post. He was Deputy Public Prosecutor of the Belgrade District Public Prosecutor's Office, before being appointed as the Serbian Republic's Deputy Public Prosecutor. *See* B92 News, Archive, *available at* http://www.b92.net/english/news (July 22, 2003).

78. *See* Final Law, *supra* note 9, art. 5.

(6) The person's willingness to cooperate in the investigation or prosecution of others.

In determining whether or not to commence a prosecution against a person, the Prosecutor should not be influenced by:

(1) The person's national origin, ethnicity, race, religion or gender;

(2) The person's current or past official position;

(3) The Prosecutor's own personal feelings considering the person, the person's associates or the victim(s); or

(4) The possible effect of the decision on the Prosecutor's own professional or personal circumstances.[79]

In the end, however, the Final Law remained silent as to the prosecutor's decision-making process in filing a case.

The Office of the Prosecutor is also weak in other ways. During the workshop, the international experts noted several problematic provisions in the Law on the Public Prosecutor's Office, which applies to the prosecutor's office in the Draft Law. All of these articles refer to the office's control over the Prosecutor for War Crimes. Article 7 reads:

> The public prosecutor, deputy public prosecutors and staff comprise the public prosecutor's office.
>
> All persons in the public prosecutor's office shall be subordinate to the public prosecutor.[80]

Article 9 reads:

> Every public prosecutor shall be subordinate to the Republic Public Prosecutor and every public prosecutor's office to the Republic Public Prosecutor's office.[81]

Article 11 reads:

> A complaint against the instruction of the Republic Public Prosecutor shall not be allowed.[82]

Article 13 reads:

> The Republic Public Prosecutor shall issue mandatory instructions to proceed to all public prosecutors.[83]

Further, Article 42 of the Law on the Public Prosecutor's Office allows for the suspension of public prosecutors, which would include the new Prosecutor for the War Crimes Court.[84]

The problem, of course, is that these provisions could severely restrict the independence of the new Prosecutor for the War Crimes Court and weaken his/her office. Since the Republic Public Prosecutor is a government appointee,

79. Mission Report, *supra* note 11. These guidelines were developed by Professor Allison Danner. *See* Alison Danner, *Legitimacy, Pragmatic Accountability and Prosecutional Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 1 (forthcoming 2004).

80. Law on the Public Prosecutor's Office, art. 7 (Nov. 23, 2001) (Translated by OSCE mission to FRY) (on file with author).

81. *Id.*, art. 9.

82. *Id.*, art. 11.

83. *Id.*, art. 13.

84. *Id.*, art. 42, which reads, in part: "the public prosecutor shall decide on mandatory suspension of a deputy, and the next higher-ranking public prosecutor shall decide on mandatory suspension of a public prosecutor. If suspension is not mandatory, it shall be decided upon by the Republic Public Prosecutor."

concern remains that the Government will be able to interfere with the Office of the Prosecutor of the War Crimes Court.

VIII.
WAR CRIMES INVESTIGATION SERVICE

Along with the Prosecutor for War Crimes, the Director of the War Crimes Investigation Service[85] serves an important role within the new War Crimes Court. The Director of the Investigation Service, acting upon the requests of the Prosecutor, will be responsible for "detect[ing] criminal offences."[86] However, the Draft Law placed the director under the control of the Ministry of Interior, which appoints and dismisses the director.[87] This creates a dangerous mechanism.

The Investigation Service should have an identity and authority separate from the Ministry of Interior. The director must be able to conduct investigations without interference from local police or other governmental authorities. As it stands now, the Ministry of Interior houses the police. The Director of the Investigation Service should have extraordinary investigative powers similar to those of the prosecutor's office. Prosecuting war criminals in the former Yugoslavia cannot proceed without a strong and professional investigative unit which can react independently and aggressively in pursuing war crimes cases. In addition, the new investigative unit must be comprised of exceptionally qualified individuals, who in turn must undergo extensive training.

There is still an overwhelming feeling in Serbia that the police are and will be a major impediment to conducting successful domestic war crimes trials.[88] The Ministry of Interior remains selective when providing information on war criminals because such information could easily be used to indict police officers.[89] A significant number of police officers were directly and indirectly responsible for war crimes committed during the wars in the former Yugoslavia.[90] Consequently, the police have not done enough to facilitate prosecutorial investigations to date.

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85. Draft Law, *supra* note 6, art. 7.

86. *Id.*

87. *Id.*

88. These views were expressed during the assessment mission to Serbia during the week of April 14, 2003. *See* Memorandum from Ljiljiana Hellman, National Legal Adivser to the OSCE, to Mark Ellis, Executive Director, IBA (Apr. 25, 2003) (on file with author).

89. The same can be said for the Yugoslav Army. Interviews suggest that the military has indicated to the Ministry of Interior that there are no military officers responsible for war crimes. *Id.*

90. *See, e.g.*, The Prosecutor v. Furundzija, Judgment, Case No. IT-95-17/1 (Dec. 10, 1998), *available at* http://www.un.org/icty/furundzija/trialc2/judgement/index.htm (finding members of the Jokers, a special military police unit, guilty of war crimes); Human Rights Watch, Yugoslav Military and Serbian Police Commit War Crimes in Kosovo, Press Release, available at http://www.hrw.org/press98/june/kosov630.htm (June 30, 1998). This opinion was also expressed to the author during various interviews during the initial assessment visit. The current Special Prosecutor for Organised Crime, however, does not believe that the Ministry of Interior harbors war criminals within the police ranks, nor does he think that there was any involvement from the Ministry of Interior in any alleged war crimes, including evidence of communal responsibility. *See* Mission Report, *supra* note 11.

During the drafting workshop, there was intense discussion on the need to separate the Investigation Service from the government. To the credit of the Serbian delegation, the Final Law enhanced the independence of the Director of the Investigation Service by requiring that his/her appointment and dismissal must first be "proposed" by the prosecutor.[91] Another improvement to the Final Law is that the Director of the Investigation Service must act in response to requests made by the prosecutor.[92] However, the Final Law still has the Investigation Service headquartered "in the Ministry of Interior".[93] Unfortunately, this arrangement does not sufficiently guarantee the independence of the Director of the Investigation Service, which should be housed in the new War Crimes Court. It remains to be seen whether the Ministry of Interior ultimately will gain control over the Director and the Investigation Service or will attempt to interfere with and thus diffuse the independence of the Investigation Service. If this happens, it is doubtful that the new War Crimes Court will ever be an effective mechanism to bring war criminals to justice.

IX.
WITNESS PROTECTION

One of the most significant omissions in the Draft Law was the failure to provide for a Victims and Witnesses Unit. A professional witness and victim protection and support unit facilitates effective investigation, prosecution and defense by encouraging victims and witnesses to come forward. Witnesses will simply not testify unless guaranteed adequate protection and safety.

The government viewed such a Victims and Witnesses Unit as "too complex, expensive and time consuming" to incorporate into the Draft Law.[94] In addition, the government believed that requiring such a unit would lead to significant delays in creating the new court, which in turn would give those who oppose the new court "an excuse to delay its implementation."[95]

The Serbian government pointed to the current Criminal Procedure Act (CPA) as being sufficient to protect witnesses and victims in war crimes trials.[96] Specifically, the government referred to Article 504(p) of the Act, which reads: "The State Attorney may order a special protection for certain witnesses, the informant witness or to his family."[97]

The international experts were adamant that this provision was insufficient to address the complex nature of protecting witnesses and victims in war crimes trials. The experts also stressed that a special unit must be fully functional on the new court's first day of operation. It must also have sufficient financial and

91. Article 8 of the Final Law, *supra* note 9, reads, in part: "[T]he Minister of Interior shall appoint and dismiss the head of the Service as proposed by the Prosecutor for War Crimes."

92. *Id.*

93. *Id.*

94. Minister Protic, Remarks at the OSCE/IBA workshop (April 14-18, 2003).

95. *Id.*

96. Criminal Procedure Act, Official Gazette (FRY) No. 70/2001, *amended by* Official Gazette No 68/2002 (2002) (on file with author).

97. Criminal Procedure Act, *supra* note 96, art. 504(p).

human resources to carry out its mission. The unit's success *cannot* be hindered by financial and personnel-related issues. Its budget should be made part of the court's overall budget supported by the government. The Draft Law already provided for a "war crimes investigation service"[98] and a "Special Detention Unit,"[99] both being technically supported by the Ministry of Justice[100] and financially supported by the government.[101] The international experts agreed that, in the same way, the Final Law should also include a Victims and Witnesses Unit.

The costs of adequately running such a unit will be high and are a valid concern for the government. Staffing alone will require substantial resources.[102] In addition, services provided by the unit will involve all stages of the trial process, including investigation, pre-trial, trial and post-trial proceedings.

The unit should provide protective measures to witnesses, people who are at risk because of testimony given by witnesses, and victims who appear before the new court. It is also essential that the unit provide medical and psychological assistance to victims and witnesses. In one of the most significant developments during the workshop, the Serbian government agreed to create a new department that would focus on witness and victim protection. The Final Law included a new section:

> A Special Department is hereby established in the District Court in Belgrade for administrative-technical tasks, tasks related to witness and victim protection and facilitating conditions for the application of procedural provisions of this Law (hereinafter "Special Department").
>
> The functioning of the Special Department is [to be] regulated by an act passed by the President of the District Court in Belgrade, with approval of the minister responsible for the judiciary.[103]

The government will still face major challenges if it is to deal effectively with issues relating to witnesses and victims. However, the fact that the Final Law creates a special department to address the concerns of witnesses and victims is a significant sign that Serbia is serious about undertaking domestic war crimes trials.

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98. *See* Draft Law, *supra* note 6, art. 7.

99. *Id.*, art. 11.

100. Article 15 of the Draft Law, *supra* note 6, states: "[T]he Ministry responsible for the judiciary shall provide appropriate facilities and other technical conditions needed for efficient and secure work of the War Crimes Prosecutor's Office, the War Crimes Counsel and the Special Detention Unit."

101. Article 16 of the Draft Law, *supra* note 6, states: "[F]unds for the work of the War Crimes Prosecutor's Office, the War Crimes Panel and the Special Detention Unit shall be provided in the budget of the Republic of Serbia."

102. By 1999, the ICTY had employed 23 people in its Victims and Witnesses Unit. In 2000, over 600 witnesses testified before the ICTY, and over 120 persons accompanied the witnesses. By 2000, witness-related expenses for the ICTY reached $1.6 million a year. *See* THORDIS INGADOTTIR ET AL., THE INTERNATIONAL CRIMINAL COURT: THE VICTIMS AND WITNESSES UNIT (ARTICLE 43.6 OF THE ROME STATUTE), A DISCUSSION PAPER, (ICC Discussion Paper #1, March 2000) (on file with author).

103. *See* Final Law, *supra* note 9, art. 11.

X.
JURISDICTION AND ORGANIZATION OF COURTS

Another provision of the Draft Law that was identified as particularly troublesome was the number of courts that would have jurisdiction over war crimes. Rather than selecting one court (for example the District Court in Belgrade) to handle the new war crimes cases, the Draft Law stipulated that three district courts would have first instance for the criminal offenses—Belgrade, Novi Sad and Nis.[104] Furthermore, the Supreme Court of Serbia would decide which court should conduct the proceedings for each individual case.[105] The international experts indicated that there were several problems with these two provisions of the Draft Law.

First, attempting to create a system for adjudicating war crimes in three separate courts was exceedingly ambitious. When considering the extraordinary administrative logistics of conducting a war crimes trial involving issues such as security, training and court personnel, it is much more advisable to consolidate resources and energy in one specialized war crimes court. Second, placing the Supreme Court of Serbia in the position of having to assign individual cases is overly bureaucratic, could potentially be politicized, and is simply unnecessary. The better alternative would be a single court that is assigned jurisdiction over war crimes cases.

In a major concession to these concerns the Serbian officials made amendments to the Final Law and assigned the District Court in Belgrade jurisdiction as the only first instance court for war crimes trials.[106] In selecting one court the drafters also eliminated the confusion associated with having the Supreme Court determine the assignment of individual cases.

Another jurisdictional issue thoroughly debated during the workshop dealt with the selection of judges for the new War Crimes Court. The Draft Law stated that the President of the Court would appoint judges for a four-year term from a pool of judges already sitting on Serbian courts.[107] The concern expressed by the international experts was that there was no indication of the qualifications or experience required to qualify as a judge. Furthermore, since the judges would be selected from the current pool of sitting judges, there was no opportunity to go "outside" this group of judges to secure the services of any other judges regardless of their expertise in the field of international humanitarian law. Opening up the process to a larger pool of candidates, as well as stipulating clear selection criteria would increase the overall credibility of the new court.[108] Finally, the Draft Law did not mention any procedures for remov-

104. *See* Draft Law, *supra* note 6, art. 9.

105. *Id.*

106. Article 9 of the Final Law, *supra* note 9, states: "The District Court in Belgrade shall have first instance jurisdiction for criminal offences referred to in Article 2 hereof."

107. *See* Draft Law, *supra* note 6, art. 10.

108. Article 10 of the Draft Law, *supra* note 6, contains a potential "expansion" clause for the selection of judges. It reads, in part: "[T]he President of the Court may assign to the War Crimes Panel judges from other courts seconded to this court, with their consent." However, the Serbian officials indicated that this clause only refers to sitting judges in other district courts.

ing a judge from the court panel. Thus, it is assumed that the total discretion of the President of the Court to select the judges implied authority to dismiss the same judges.

In the end, no changes were made to the Final Law in relation to these jurisdictional issues. Whether the selection process contained in the present law is sufficiently transparent to attract the very best judges, regardless of their current position in the judiciary, will become apparent in the future.

XI.
PRESENTATION OF EVIDENCE

The Draft Law stated that the Criminal Procedure Act (CPA) would apply to the new War Crimes Court.[109] However, the CPA is generally inadequate when applied to prosecutions of complex cases associated with international war crimes. For instance, the rules of evidence under the CPA are inflexible in areas of admissibility of evidence, cross-examination, wire-tapping, and accurately recording witness statements.[110] In addition, under Serbian law, evidence admitted in a criminal trial must be virtually incontrovertible. For instance, statements given to the police and statements of law enforcement officers about what defendants or witnesses said are not directly admissible.[111] More flexible rules of evidence are needed in war crimes cases because they involve complex factual scenarios, as well as hundreds of witnesses and endless exhibits.[112]

For example, the yet-to-be-adopted Rules of Evidence and Procedure for the new War Crimes Court should provide flexibility in securing victims' and witnesses' statements rather than requiring personal appearance at the actual trial. The Draft Law omitted any reference to special proceedings for testimony by victims and witnesses. Instead, the Draft Law incorporated the proceedings of the CPA, which are insufficient to address the special needs of victims and witnesses who testify before the court.[113]

The problems of requiring victimized witnesses to appear at a trial are manifold. Many witnesses do not keep their contact information current with officials, so service of process can never be properly served. Similarly, many

109. Article 12 of the Draft Law, *supra* note 6, states: "Special provisions of the Criminal Procedure Act, governing the proceedings against the organized crime criminal offences (chapter XXIXa), shall apply to the perpetrators of the criminal offences referred to in Article 2 of this Law."

110. These general concerns on evidence gathering were expressed to the author during interviews in Belgrade. Interviews with Sead Spahovic, State Public Attorney, Mr. Jovan Prijic, Special Public Prosecutor, and Others in Belgrade, Serbia (Apr. 13-18, 2003). Further, under the provisions oft the CPA, testimony and statements made in court are entered into the record by a presiding judge. *See* Criminal Procedure Act, *supra* note 96, art. 312. During trial observations on April 14-15, 2003, the author found that, normally, the presiding judge makes his/her own interpretation of testimony and that becomes the record. Testimony is only entered verbatim on the motion of a party or at the will of the presiding judge. *Id.*, art. 312(3).

111. The statement itself may be read into the record, but questions and answer sessions conducted by the police are not admissible unless "related to the criminal trial." *Id.*, art. 93. Further the defendant may dictate the statement into the record himself if he requests. *Id.*

112. ARCHBOLD INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE AND EVIDENCE 249 (Rodney Dixon et al. eds., 2003).

113. *See* Draft Law, *supra* note 6, art. 12.

witnesses are fearful that their lives will be in danger if they appear in court due to threats of reprisal by those against whom they testify. Others simply refuse to appear.

The international experts thought it imperative that the Final Law contains a provision to guard against such occurrences. They argued that the new War Crimes Court should provide for an exception to the principle of personal court appearance for witnesses in order to protect victims and witnesses. This proceeding should be able to be conducted *in camera* or allow the presentation of evidence through electronic or other means. Specifically, the new court should also allow oral or recorded testimony by means of video or audio technology, as well as the introduction of documents or written transcripts. This type of testimony is particularly important in cases of sexual violence or where the victim or witness is a child. Currently, these protective measures are not possible under Serbia's CPA.

The international experts suggested that the Final Law include language similar to that now incorporated into the ICC Statute:

> As an exception to the principle of public hearings [. . .] the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.[114]

In yet another significant adoption of international standards, the government added crucial changes to the Final Law that dramatically enhance the opportunity for witnesses to give evidence without appearing in court. The new provision of the Final Law now reads:

> When the presence of a witness or victim at the main hearing cannot be ensured, their questioning may be conducted via video conference link.
> Questioning of witness or victim in the manner specified in paragraph 1 of this Article may be conducted through international legal aid.[115]
> The Court may rule, following a reasoned motion of an interested party, to protect personal information of the witness or victim.[116]

Further elaboration of these new evidentiary proceedings will have to be incorporated in either the CPA or the still-to-be-adopted Rules of Procedure and Evidence for the court.

XII.
OFFICE OF THE DEFENSE COUNSEL

As already noted, adding a provision in the Final Law for a "Special Department" to deal with administrative and technical issues, including witness and victim protection, was one of the crucial changes made to the Draft Law.[117]

114. ICC Statute, *supra* note 29, art. 68(2).
115. *See* Final Law, *supra* note 9, art. 14.
116. *Id.*, at art. 15.
117. *See id.*, art. 11.

The operational details of this new department will be defined by the president of the new court with approval by the Minister of Justice.[118]

This new Department should also include an Office of War Crimes Defense Counsel. Experiences with the ICTY and ICC have taught as much. The ICTY established the Directive on the Assignment of Defence Counsel in 1994, which has since been amended seven times, because it recognized that providing defense counsel for defendants who are indigent is essential for creating fair and internationally accepted trials.[119] The current form of the directive governs the procedures for the assignment of defense counsel, their conduct and the calculation and payment of their fees.[120] The fact that ninety percent of suspects and accused appearing before the ICTY require assigned counsel demonstrates the importance of supporting the defense counsel for those who are indigent.[121] This undoubtedly will be the situation in Serbia. Eventually, the ICTY established the Association of Defence Counsel in December 2002.[122]

Similarly, the ICC has already recognized the need to organize the staff of its Registry to promote the rights of the defense. This includes providing support, assistance and information to all defense counsel appearing before the Court.[123] The ICC is also in the process of creating an independent defense bar association, pursuant to its rules.[124] The Serbian Bar Association could support a similar specialized defense bar for the new War Crimes Court.

It is extremely important that the new War Crimes Court provide sufficient support for defense counsel, particularly those attorneys who will defend those who are indigent. The equality of arms requires that there be a fully supported office for defense counsel. In doing so, Serbia will enhance the likelihood of establishing a war crimes court that will meet international standards of due process and gain the support of the entire international community.

XIII.
INTERNATIONAL TECHNICAL ASSISTANCE OFFICE

The challenges of creating a domestic war crimes court for any country are daunting. However, creating such a court for the former Yugoslavia, and partic-

118. The operations of this Department shall be defined by an act made by the President of the District Court in Belgrade and with an approval by the Minister of Justice. *See id.*, art. 11.

119. *Directive on Assignment of Defence Counsel*, U.N. Doc. IT/73/Rev.9 (as *amended* July 12, 2002). The directive implements ICTY Rules 44 and 45 regarding qualification and assignment of counsel.

120. *Id.*; *see also* Stuart Beresford, *The International Criminal Tribunal for the Former Yugoslavia and the Right to Legal Aid and Assistance*, 2 INT'L J. HUM. RTS. 49 (1998).

121. *See* Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda, U.N. GAOR, 54th Sess., Agenda Items 142 and 143, at 64, U.N. Doc. A/54/634 (1999) [hereinafter U.N. Financial Report].

122. Press Release, Registrar of the International Criminal Tribunal for the Former Yugoslavia, Association of Defence Counsel Formally Recognised by the ICTY (Dec. 19, 2002), *available at* http://www.un.org/icty/latest/index.htm.

123. *See* ICC Rules, U.N. Preparatory Commission for the ICC, U.N. Doc. PCNICC/2000/1/Add.1, at 19-20 (2000) (English version).

124. *Id.*

ularly for Serbia, could easily be described as near impossible. A consistent opinion expressed in Serbia is that the political will to adjudicate alleged war criminals simply does not exist.[125] One step that could be instituted to countermand this general perception is a formal program whereby the international community can function as an advisor to the new court.

Based primarily on pressure from the U.S. government, the new War Crimes Court for Serbia will be exclusively domestic. There will be no direct participation by the international community as there is for other ad hoc war crimes tribunals such as those in East Timor and Sierra Leone.[126] Although Serbia will receive substantial financial assistance from the international community—primarily from the United States—to establish the new court, there will be no international experts who will "co-participate" as judges, prosecutors or defense attorneys. Considering the complexities of creating and running a war crimes tribunal, the omission of international participants is a mistake.

One possible way of rectifying this omission is to create an International Technical Assistance Office, headquartered in Belgrade. The purpose of this office would be to assist in the government's efforts to undertake domestic war crimes trials. The International Technical Assistance Office (ITAO) would comprise several full-time international experts, along with a sufficient number of domestic staff. The ITAO would be delegated authority over two important elements of conducting domestic war crimes trials: (1) providing continuing legal education to judges, prosecutors and defense attorneys; and (2) providing trial observers to review, assess and evaluate each trial on a continuous basis.

1. Continuing Legal Education Training

The need for a continuing legal education program for the judicial system is all too apparent. The judiciary still suffers from an inferiority complex in relation to the executive and the legislative branches of government. The previous regime left behind a judiciary that was submissive to the state, not respected by the public, and whose judicial findings were often unjust. The greatest challenge facing the new democratic Serbia is to create a truly independent judiciary.

Although judges must have formal university-level legal training, they are not required to have practiced before tribunals, nor are they required to take any specific courses before taking the bench. Similar to most civil law countries, in order to enter the judiciary, law graduates must spend at least two years working as court interns in the municipal district or commercial courts, after which they may take the Bar exam.[127] Similarly, sitting judges also do not require any

125. *See* Mission Report, *supra* note 11.

126. Interview with Ambassador William Montgomery, U.S. Ambassador to Serbia and Montenegro, in Belgrade (Apr., 2000).

127. After successfully passing the Bar exam, a court intern may assume the position of court assistant and, after at least two years of experience as a court assistant, a candidate is eligible for appointment as a municipal court judge. Judges at higher courts are required to have between four and 12 years of post-Bar exam legal experience to qualify for appointment. Court interns are eligible to take the Bar exams after two years, but generally may serve up to three years as an intern.

specific training or education; there are no formal training programs and no requirement of continuing legal education courses for judges.

The ITAO would support ongoing training in domestic war crimes trials for the following groups:

- special prosecutors and deputies;
- defense attorneys;
- judges;
- members of the Special Police Unit; and
- court personnel.

The training could be conducted as part of the work of the Judicial Centre for Professional Education and Advanced Training, a joint initiative of the Ministry of Justice and the Serbian Judges' Association and the Humanitarian Law Centre, which is currently conducting continuing legal education programs.[128] The training should be continuous and not short term. A team of international training experts should be supported through an international legal entity (for example, the IBA) to work directly with the ITAO to design and implement the training program.

The training should focus on issues comprising the substantive and procedural law relevant to prosecuting individuals alleged to have committed gross violations of international law. Further, it should be conducted separately for each targeted group and, when appropriate, jointly on issues relevant to all groups. The international training team could coordinate with other international training programs to provide additional training assistance in domestic war crimes trials.[129]

2. *Trial Observations*

As already stated, prosecuting individuals at a national level for violating international humanitarian law is both difficult and controversial. One major issue is the fairness of the proceedings. Generally, in post-conflict countries, the court system cannot guarantee a fair and politically unbiased judicial process. There is little confidence that such cases can be tried impartially, independently and free of political criminals or other influences, or without ethnic bias.[130]

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128. Existing training is targeted at judges, prosecutors and other legal professionals.

129. This training is already being conducted through the Swedish International Development Agency (SIDA), in cooperation with the IBA and the Humanitarian Law Centre. The goal of the program is to enable a cadre of Serbian judges, prosecutors and lawyers to conduct domestic war crimes trials. Another example of training is the ABA/CEELI program which is already involved with strengthening the capacity of the judiciary and the legal profession to deliver justice. The program supports training and technical assistance aimed at boosting the capacity of Serbia's independent Judges' Association, training judges in both civil and criminal procedure through a newly established Judicial Training Centre. *See generally* SIDA, *Sweden Strengthens the Serbian Judiciary*, *at* http://www.sida.se/Sida/jsp/polopoly.jsp?d=107 (Jul. 3, 2001); American Bar Association, CEELI Institutte, *at* http://www.abanet.org/ceeli/special_projects/jtc/serbia.html (last visited Apr. 17, 2004).

130. For instance, the trial of Ibrahim Djedovic in Bosnia drew extensive international criticism after he was found guilty of nationally defined war crimes charges and sentenced to ten years imprisonment despite monitors' reports that there was insufficient evidence to establish guilt beyond a reasonable doubt. He was also denied access to legal counsel during the first five months of his

The trial observer program would not have to duplicate the program created by The Office of the High Representative for Bosnia and Herzegovina ("OHR").[131] The OHR program entitles trial observers to attend and observe any judicial proceeding. They can also inspect all case papers relating to proceedings and may observe any stage of a prosecution, whether pre-trial or otherwise.

The trial observer program for Serbia envisages more of a partnership between the ITAO and the domestic judicial personnel. This will require a "buy-in" from the domestic side based on the understanding that the international trial observers are there to assist the domestic players (judges, prosecutors, defense attorneys and court personnel) in improving the overall process of conducting domestic war crimes trials. The Association of Prosecutors, the Serbian Judges' Association and the Bar Association of Serbia have already indicated their support for this program.[132]

The ITAO would include a program to review, assess and evaluate each war crime trial continuously. The independent trial observers offer a "check" on court proceedings, including their efficiency, due process, competency and appropriateness.

To gain international recognition of its domestic war crimes trials, the Serbian government will have to ensure that the trials meet international standards. Court proceedings will benefit from international and national observers, trained lawyers and judges, who can independently observe a trial and report on its process. There should be trial observers present throughout each trial, including pre-trial proceedings.

The trial observers should be given authority, notwithstanding any procedural law or regulation to the contrary, to attend and observe the trials. At the conclusion of each trial, the trial observers will hold separate meetings with the relevant judge(s), prosecutors and defense counsel to review the trial and make recommendations for improvement.

XIV.
POTENTIAL WAR CRIMES TRIALS

The potential number of war crimes trials that will *actually* take place under the new War Crimes Court is difficult to predict. It will depend largely on

detention, was prevented from summoning defense witnesses and the indictment was substantially altered the day before closing arguments were heard. *See, e.g., Djedovic Says He Was Certain of His Innocence*, ONASA NEWS AGENCY, Mar. 29, 2000, LEXIS, News & Business, All News; *Bosnia: Sarajevo Court Frees War Crimes Suspect for Lack of Evidence*, BBC WORLDWIDE MONITORING, Mar. 27, 2000, LEXIS, News & Business, News, All News; *Opposition Party Says Ruling Muslims using Former Rebel as Scapegoat*, BBC, Jan. 9, 1999, LEXIS, News & Business, News, All News; Tracy Wilkinson, *Bosnian Case Pours Salt on a War Wound; Sarajevo Authorities Have Charged Legislator Who Sided with a Renegade against Fellow Muslims during Conflict*, L.A. TIMES, Oct. 25, 1997, LEXIS, News & Business, News, All News.

131. *See* Consultant's Report to the Office of the High Representative for Bosnia and Herzegovinia—the Future of Domestic War Crimes Prosecutions in Bosnia and Herzegovina (May 2002) (on file with author).

132. This opinion was expressed to the author in meetings held in Belgrade during April 2003.

the ability of the prosecutor to gain the cooperation of a number of key players. Victims or their families will have to be willing to testify years after the atrocities took place. Most importantly, the government will have to be willing to turn over documents vital to linking the atrocities to government and military personnel. This, in turn, will require the Ministry of Interior and the military to hand over individuals accused of these crimes who are still working in the government or military.

However, the *potential* number of war crimes trials is enormous. This is based on the number of violations of human rights and humanitarian law that took place during the wars in the former Yugoslavia between 1998 and 1999.[133] According to unofficial estimates, there are over 10,000 potential suspects in the Bosnian conflict alone.[134] Over 2,500 suspects have already been reviewed by the ICTY.[135] The extent of the violations can be appreciated even more by focusing on just one relatively short period in the Kosovo conflict. Between March 24 and June 10, 1999, at the height of the war in Kosovo, the number of atrocities committed against Kosovar Albanians by Yugoslav armed forces, Serbian police and paramilitary forces was significant. Nearly one million Kosovo Albanians were forcefully displaced during this period,[136] and between 7,494 and 13,627 Kosovo Albanians were killed during the same period.[137] The vast majority of refugees reported that their property was looted or pillaged by Serbian forces, and that a significant number of civilians were deliberately targeted for cruel, inhuman or degrading treatment.[138]

CONCLUSION

The importance of the Serbian government's decision to create a special court for the prosecution of war crimes cannot be overestimated. Despite the difficulties and challenges of prosecuting persons accused of international humanitarian crimes, the new court represents a milestone for a country desperately seeking normality. Serbia's past complicity in some of the worst atrocities since the Holocaust requires a long, agonizing journey towards atonement and eventual acceptance back into the international community. This can only be achieved if those responsible for the atrocities are held accountable. As long as the perpetrators of those crimes live above the law, never fearing justice, ordinary citizens will continue to deny that the actions of these individuals violated any sense of legal order.

133. These violations can be grouped into several categories: forced displacement; killings; rape/sexual assault; arbitrary detention; destruction, looting, and pillaging of civilian property; torture and inhumane treatment; and confiscation of documents.

134. *See* Amnesty International, http://web.amnesty.org/web/web.nsf/print/bih-summary-eng (last visited Apr. 12, 2004).

135. *Id.*

136. KOSOVO REPORT – INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, Annex at 1 (2000).

137. *Id.*

138. *Id.*

The new court should act as Serbia's second stage of accepting accountability, after its recent, albeit reluctant, acceptance of the ICTY. The court's ultimate success will depend on Serbia's willingness to adjudicate alleged war criminals aggressively. Achieving this goal is possible, but only if the Serbian government makes the necessary long-term commitment, accompanied by substantial resources and unwavering political will.

The government's recent exercise to draft a new law creating a special War Crimes Court shows considerable promise for its commitment to hold individuals accountable for gross violations of humanitarian law. Had the Serbian government refused to redraft this law, or to accept assistance from the international community, the attempt to create the special War Crimes Court would have been a monumental failure. The initial Draft Law contained significant weaknesses in areas such as the elements of the offences, jurisdictional issues, immunity, communal responsibility, evidence, witness protection, sentencing, selection criteria for judges and prosecutors, and a host of other issues discussed in this article.

Instead, the government, in cooperation with the OSCE, the U.S. Embassy and the IBA, undertook a two-day workshop with international legal experts to review and improve the Draft Law, prior to its ratification by the Serbian Parliament. As a consequence, the Final Draft incorporated significant changes and improvements from the earlier draft. Some of the more important changes included the expansion of criminal offences that would be prosecuted by the new court, the strengthening of the prosecutor's independence, assurances of greater independence for the Director of the Investigation Service, the creation of a separate department for witness and victim protection, establishing only one district court (rather than three) with jurisdiction for war crimes trials, and expanding and enhancing ways for witnesses to give evidence without appearing in court.

There are, however, still some concerns with the Final Law and its failure to address or resolve several important issues. These issues include the failure to make specific reference to command responsibility, the absence of any language ensuring that no statutory or other limitations shall apply to the prosecution and punishment of crimes, and the decision not to include a provision that would prevent granting of immunity.

Furthermore, it will be imperative for the new court to involve the international community in its administration since there will be no direct participation by the international community in the functioning of the new court, as there is for *ad hoc* war crimes tribunals such as East Timor[139] and Sierra Leone.[140] Thus, there will be no international experts who will "co-participate" as judges, prosecutors or defense attorneys. To resolve this omission, Serbia should create an International Technical Assistance Office. This office would provide continuing legal education to judges, prosecutors and defense attorneys. It would also

139. *See* UN Transitional Authority for East Timor (UNTAET), S.C. Res. 1272, U.N. SCOR, 54th Year, Res. & Dec., at 130, U.N. Doc. S/INF/55 (*adopted* 1999).

140. *See* S.C. Res. 1315, U.N. SCOR, 55th Year, Res. & Dec., at 108, U.N. Doc. S/INF/56 (*adopted* 2000).

provide trial observers to review, assess and evaluate each trial on a continual basis.

Now that the Final Law has been promulgated, the next step of creating the court will be the most challenging. This will take time and resources. However, the international community owes it to Serbia to assist in making the Court a success. If this can be achieved, Serbia will have taken the most significant step, since the arrest and surrender of Slobodan Milosevic to the ICTY, in returning to the international community as a nation mindful of its obligations to make perpetrators of war crimes accountable and to bring justice to victims. In doing so, Serbia will have finally discovered that justice is inextricably linked to accountability.

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Legal Plug-Ins: Cultural Distance, Cross-Listing, and Corporate Governance Reform

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"Even Confucian managers respond to incentives."[1]

INTRODUCTION

This article considers the extent to which countries or companies can successfully borrow foreign corporate governance elements to improve their own corporate governance system. At the national level, such borrowing—often referred to as "transplantation"—requires public action by law-makers or regulators. The history of legal transplantation is long and checkered, beginning with the "law and development" movement of the 1960s. Often done at the behest of Western donor countries, direct transplantation efforts were largely futile in generating Western-like economic growth and have caused considerable political strife. The demise of communist regimes in Europe turned the region into a laboratory for legal reforms with the aim of establishing market economies. Generally inspired by North American notions of corporate governance, legal reforms during the 1990s were expected to provide investors with a hospitable and protective environment.[2] With few exceptions, these reforms produced outcomes varying from disappointing to ruinous (as in Russia and the Czech Republic).[3]

Corporate governance reform is popular nonetheless. Studies conducted since the mid-1990s show that simple metrics of corporate governance quality correlate positively with important economic factors at both the national level and firm level.[4] This evidence suggests, at least by implication that improving the quality of corporate governance would bring about concomitant benefits for nations and firms alike. Poor corporate governance was pointed to as one of the factors that could lead to economic crises like the 1997 financial crisis in Asia. Policy documents endorsed by major international bodies now advance codes of optimal corporate governance principles to be implemented by governments

1. Bernard S. Black, *Corporate Governance in Korea at the Millennium: Enhancing International Competitiveness*, 26 IOWA J. CORP. L. 537, 545 (2001).

2. A prominent example for a reform blue-print that drew on American insights on corporate governance but did not rely directly on American legal sources is the code that was designed for Russia. *See* Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911 (1996).

3. Bernard Black, Reinier Kraakman & Anna Tarassova, *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1739 (2000); Merritt B. Fox & Michael A. Heller, *Corporate Governance Lessons from Russian Enterprise Fiascoes*, 75 N.Y.U. L. REV. 1720 (2000); Edward Glaeser, Simon Johnson & Andrei Shleifer, *Coase versus the Coasians*, 116 Q. J. ECON. 853 (2001); D.V. Vasilyev, *Corporate Governance in Russia: Is There any Chance for Improvement?* (2001), *available at* http://www.imf.org/external/pubs/ft/seminar/2000/invest/pdf/vasil2.pdf.

4. There are now numerous studies in this branch of the literature. *See, e.g.*, Rafael La Porta et al., *Law and Finance*,106 J. POL. ECON. 1113 (1998); Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997); Rafael La Porta et al., *Agency Problems and Dividend Policies Around the World*, 55 J. FIN. 1 (2000); Ross Levine, *Law, Finance, and Economic Growth*, 8 J. FIN. INTERMEDIATION 36 (1999); Ross Levine, *The Legal Environment, Banks, and Long-Run Economic Growth*, 30 J. MONEY, CREDIT & BANK. 596 (1998); Asli Demirguc-Kunt & Vojislav Maksimovic, *Law, Finance, and Firm Growth*, 53 J. FIN. 2107 (1998).

around the world.[5] Corporate governance ratings prepared by private agencies encourage companies to adopt measures that the agencies consider desirable.[6] These templates for desirable corporate governance invariably draw on Anglo-American elements.

An alternative to corporate governance improvement through public action is improvement through private action by particular corporations. Such self-improvement by private issuers faces serious obstacles, however. For instance, financial market players may consider the adoption of more investor-protective bylaws as a non-credible commitment by the issuer's insiders. This may be the case if the issuer's general national laws, regulatory agencies, and courts do not give full effect to such bylaws. To overcome this problem, issuers can engage in governance-improving private action by listing their securities on a foreign market—say, the U.S. market—whose governance system they consider superior.[7] The idea that foreign firms actually engage in cross-listing to improve their corporate governance is often attributed to Jack Coffee.[8] Bernard Black generalized this insight in several dimensions and coined the metaphor "piggybacking" to describe such renting of a country's corporate governance system by foreign corporations.[9] In this view, cross-listing on a foreign stock market can serve as a bonding mechanism for corporate insiders to credibly commit to a better governance regime. Cross-listing could thus become a vehicle for international convergence toward globally desirable governance regimes.

The relations between cross-listing and corporate governance raise two separate but related questions. The first question may be dubbed "bonding or avoiding?" and reflects the idea that in terms of corporate governance, cross-listing may fail to engender the putative benefits suggested by the cross-listing-as-bonding hypothesis. In contrast to the bonding hypothesis, an "avoiding hypothesis" proposes that stringent corporate governance requirements in destina-

5. The central document of this nature, on which many other documents draw, is AD HOC TASK FORCE ON CORPORATE GOVERNANCE, OECD PRINCIPLES OF CORPORATE GOVERNANCE, Doc. SG/CG(99)5 3 (1999); *see also* THE WORLD BANK, CORPORATE GOVERNANCE: A FRAMEWORK FOR IMPLEMENTATION (2001).

6. There are now several such rating services. For a discussion and empirical analysis based on data from Credit Lyonnais Securities Asia, see KRISHNA PALEPU, TARUN KHANNA & JOSEPH KOGAN, GLOBALIZATION AND SIMILARITIES IN CORPORATE GOVERNANCE: A CROSS-COUNTRY ANALYSIS (Harvard University Strategy Unit, Working Paper No. 02-041, 2002).

7. The Enron/Arthur Andersen debacle and the ensuing waves of scandal have tarnished the reputation of the American market, but probably have not eroded it completely. *See* Edmund L. Andrews, *U.S. Business Dim as Model for Foreigners*, N.Y. TIMES, June 27, 2002 ("People around the world who for decades have looked to the United States as the model for openness and accountability in business have been sorely disillusioned by the mounting waves of scandal."). Yet even today, many would argue that in a global comparison, American securities markets provide public investors with a more hospitable and protective environment than most other markets around the world.

8. John C. Coffee, *The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications*, 93 NW. U. L. REV. 641 (1999). For an earlier, more general analysis, see Amir N. Licht, *Regulatory Arbitrage for Real: International Securities Regulation in a World of Interacting Securities Markets*, 38 VA. J. INT'L L. 563 (1998).

9. Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 UCLA L. REV. 781, 816 (2001); *see also* Bernard S. Black, *The Core Institutions that Support Strong Securities Markets*, 55 BUS. LAW. 1565 (2000) (an abridged version).

tion markets actually deter insiders and may drive them to avoid cross-listing on these markets. I dealt with this issue on several occasions and argued that the avoiding hypothesis is better supported by empirical evidence.[10]

The bulk of this article is dedicated to analyzing the second question, which may be called "can bonding stick?" When properly considered, this inquiry goes to the root of comparative legal analysis and the design of legal reform based on foreign sources. In the present context, the question is whether foreign legal elements can be neatly "plugged-in" to an existing corporate governance system, be compatible with it, and produce the expected improvements. Such plugging-in of foreign legal elements can be achieved either through public or private action. Public action would include legislative or regulatory reform whereas private action would entail cross-listing on a foreign, better-governed market. This article argues that in considering the prospects of such steps one must assess the difference, or distance, between the source and target systems.[11] A crucial factor appears to be the "cultural distance" between the two systems.

Arguments about cultural uniqueness of people, companies, or nations run the risk of sounding like hollow clichés. Worse yet, such arguments could be raised by interested rent-seeking parties such as managers and bureaucrats to thwart reform in governance institutions. To avoid this trap, this article draws on research from several disciplines. While the core problem is legal and economic in nature, other fields are also relevant—particularly, psychology and accounting. Securities laws mandate disclosure principles for public issuers, but the larger share of the content of disclosure is determined by accounting standards and practices. These disclosure duties are carried out by professionals in companies' home countries. I turn to different branches of psychology to give concrete content to the intuitive notions of cultural distance and corporations' foreignness. Recent advances in this field provide a framework for rigorously analyzing international differences in values and cognitive styles. Evidence surveyed in this article indicates that people from divergent cultures exhibit difference in their perception and judgment—a finding that bears directly on corporate governance. Among other things, it is now well-established that the functioning of national accounting and auditing systems is affected by cultural factors.

While the arguments put forward in this article are general, the present analysis focuses on South Korea as the central reference case. Korean corporations tend to be organized in conglomerates called *chaebol*, which commentators often associate with Korea's Confucian heritage. Korea belongs to a group of

10. *See* Amir N. Licht, *Genie in a Bottle? Assessing Managerial Opportunism in International Securities Transactions*, 2000 COLUM. BUS. L. REV. 51 (2000) [hereinafter *Genie in a Bottle*]; Amir N. Licht, *Managerial Opportunism and Foreign Listing: Some Direct Evidence*, 22 U. PA J. INT'L ECON. L. 325 (2001) [hereinafter *Managerial Opportunism*]; Amir N. Licht, *Cross-Listing and Corporate Governance: Bonding or Avoiding?*, 4 CHI. J. INT'L L. 141 (2003) [hereinafter *Bonding or Avoiding*].

11. As a dichotomous question—namely, whether the reform will create any change in the target system—the question is uninteresting. Surely, any non-negligible step will produce some change. The challenge lies in assessing gradual and relative differences and their impact.

Asian countries with a Confucian heritage distinctly different from the Western cultural heritage. The issue of Confucian values has been a constant theme in comparative corporate governance analyses for over a decade, but the effect of these values has not been satisfactorily discerned.[12] More generally, Korea is a prime example of economic development, having grown from a poor country in the early 1960s to one of today's leading economies. In the wake of the 1997 Asian financial crisis, Korea adopted North American corporate governance features to embark on a path of legal and institutional reform. In addition, the Korean government in 2002 took steps to encourage cross-listing of Korean corporations on several foreign markets.[13] Therefore, the Korean case provides us an opportunity to analyze efforts toward corporate governance improvement through both public and private action. Among English-language materials, scant attention has been paid to the effect of Korea's culture on the implementation of the legal reforms or the recent cross-listing initiative.[14] Preliminary evidence from the short period following the reforms suggests, however, that many of them remain on paper only, because of cultural factors. This article notes that these reforms may reflect a graver problem. Implementing foreign governance mechanisms incidentally reflects an attempt to write off Korea's Confucian heritage as an asset for governance institutions. Korea's cultural heritage should not be perceived solely as an archaic legacy of past generations. Rather, this cultural endowment should be regarded as part of the country's social capital, capable of modern, productive use.

Finally, the article returns to cross-listed firms and argues that a country's foreign character retains its dominance in under-appreciated ways. While cross-listing might erode some of these firms' national features, it cannot eliminate them. Adding a layer of North American rules cannot remedy deeply-rooted deficiencies in firms' governance. Companies and their management that cross-list in the United States do not become American by this transaction. In addition to affecting the firm itself, cross-listing also affects the markets on which the firm is listed. Specifically, foreign firms' home markets tend to dominate the price formation processes of their securities. This dominance by the foreign firms' home market is also related to cultural distance through its effect on informational asymmetries. Cross-listing can thus externalize undesirable effects to the host market, particularly in the form of insider trading.

Part I begins with a brief review of the relations between cross-listing and corporate governance as reflected in the bonding-or-avoiding debate. It then points to recent empirical evidence suggesting the importance of cultural distance in cross-listing patterns around the world. Part II begins with some background on Korean corporate governance. Next, this Part elucidates the notions of firms' foreignness and cultural distance and demonstrates how these concepts

12. The large majority of such analyses have dealt with Japan, the prominent Asian economy in the late 1980s.

13. *Companies Allowed to List Stocks Directly on Nine Foreign Bourses*, THE KOREA HERALD, Feb. 6, 2002. *See infra* note 89.

14. *See infra* note 100.

can illuminate corporate governance problems in Korea. Part III focuses on the dominance of home country securities markets in price formation processes of cross-listed stocks.

I.
UNDERSTANDING CROSS-LISTING

A. Financial and Business Aspects

Cross-listing transactions[15] have attracted the attention of finance scholars for over twenty-five years.[16] Interest in cross-listing has been on the rise since the mid-1980s, paralleling the growing number of foreign issuers listed on American markets.[17] Scholars have advanced several independent theories regarding what motivates companies to cross-list their shares on foreign markets. A certain evolution is identifiable in these theories and the studies that purported to test them. These theories were first about financial motivations for cross-listing and then, beginning in the early 1990s, studies about other business motivations for cross-listing also emerged. For present purposes, brief mention of these theories will suffice.[18]

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15. Two notes about terminology: First, this article usually uses "cross-listing" to describe the relevant transaction but the literature also interchangeably refers to dual listing, multiple listing, and foreign listing. While I prefer the latter term, which is the most accurate and general, "cross-listing" is the more commonly used term today. Second, unless the context indicates otherwise, references to stocks or shares in the text also refer to other corporate securities.

16. The pioneering work in the finance literature is Robert C. Stapleton & Marti G. Subrahmaniam, *Market Imperfections, Capital Market Equilibrium and Corporate Finance*, 32 J. FIN. 307 (1977). Subsequent seminal studies include Rene Stulz, *A Model of International Asset Pricing*, 9 J. FIN. ECON. 358 (1981); Vihang R. Errunza & Etienne Losq, *International Asset Pricing under Mild Segmentation: Theory and Test*, 40 J. FIN. 105 (1985); Gordon J. Alexander, Cheol S. Eun & S. Janakirmanan, *International Listings and Stock Returns: Some Empirical Evidence*, 23 J. FIN. & QUANTITATIVE ANAL. 135 (1988). However, listing stocks on foreign markets—namely, markets other than the issuer's country of nationality—is a much older phenomenon. Canadian railway firms were listed on the New York Stock Exchange (NYSE) and the London Stock Exchange (LSE) as of the 1910s. Toward the end of the 1980s, major firms from the three major industrial blocs (the United States, Europe, and Japan) became cross-listed on several exchanges in these regions. *See* Licht, *supra* note 8, at 564. Since the early 1990s, the number of foreign firms listed on the markets of developed countries ranged between 5-15% of the total number of listed issuers. For updated statistics on foreign listing, see the website of the World Federation of Exchanges, *at* http://www.world-exchanges.org.

17. The common way for issuers to list on a foreign stock exchange, or just create a foreign market presence without listing, is by using a depositary receipt (DR) facility. DRs include American Depositary Receipts (ADRs), Global Depositary Receipts (GDRs), and New York Shares (NYSs). These are negotiable U.S. securities that generally represent a non-U.S. company's publicly traded equity. There are also Euro DRs (EDRs). Although typically denominated in U.S. dollars, depositary receipts can also be denominated in Euros. Currently, there are over 2,000 depositary receipt programs in the United States for companies from over 70 countries. *See* the Bank of New York's guide on depositary receipts, *available at* http://www.adrbny.com/dr_basics_and_benefits.jsp. For an overview of legal aspects, see Mark A. Saunders, *American Depositary Receipts: An Introduction to U.S. Capital Markets for Foreign Companies*, 17 FORDHAM INT'L L.J. 48 (1993).

18. For further detail, see Licht, *Genie in a Bottle*, *supra* note 10, on which this subsection draws. *See also* G. Andrew Karolyi, *Why Do Companies List Abroad? A Survey of the Evidence and Its Managerial Implications*, 7 N.Y.U. SALOMON BROTHERS CENTER MONOGRAPH No. 1 (1998).

Segmentation and Diversification Gains

Cross-listings were first thought of as a means to lower firms' cost of capital by enabling the firm to get more money from investors when offering its stock to the public.[19] This effect could stem from two related sources: diversification gains and segmentation gains. Internationally diversified portfolios minimize the investor's exposure only to the global systematic risk.[20] Segmentation occurs where similar assets in different markets have different prices, barring transaction costs. The popularity of investing in emerging market stocks largely stems from potential segmentation gains. Such markets often exhibit barriers to foreign investment due to regulatory limits on foreign holdings in domestic corporations, informational barriers, and so forth. Cross-listing brings foreign stocks closer to investors, in addition to several other advantages arising from lower transaction costs.

Liquidity

Cross-listing may contribute to share value by increasing stock liquidity, as measured by the bid-ask spread. Narrower spreads following a cross-listing would indicate improved liquidity, which increases share value.[21] Cross-listing may result in enhanced inter-market competition that works to lower the spread and may improve liquidity. However, multi-market trading might decrease liquidity by fragmenting order flows among the markets. The net result depends on the circumstances of each security.[22]

19. For a summary, see René M. Stulz, *Globalization of Corporate Finance and the Cost of Capital*, 8 J. APPLIED CORP. FIN. 30 (1999). An alternative, more technical way, to present this idea is to consider cross-listing as a means for lowering the expected return on capital. When a firm has to promise would-be investors a higher return on their capital contribution per share, the firm and its entrepreneurs affectively get equity capital at a higher cost. Higher stock values are therefore associated with lower expected returns, from the firm's perspective.

20. At the domestic economy level, a firm's return has a unique risk component stemming from its specific characteristics and business. This non-systematic risk can be "diversified away" relatively easily by investing in a number of firms engaged in different businesses. Even a little diversification, such as investment in a handful of randomly chosen stocks, can provide a substantial reduction in risk. The other type of risk, systematic risk, is unavoidable; that is, it is undiversifiable at the domestic level because systematic risk stems from economy-wide perils that threaten all businesses. International investment takes diversification one step further. For a review, see Vihang Errunza et al., *Can the Gains from International Diversification be Achieved without Trading Abroad?*, 54 J. FIN. 2075 (1999); K. Geert Rouwenhorst, *European Equity Markets and EMU*, 55 FIN. ANALYSTS J. 57 (1999).

21. Improved liquidity means mainly that an investor can trade the security with lower premium (the bid-ask spread) and lower market price impact. *See* Yakov Amihud & Haim Mendelson, *Asset Pricing and the Bid-Ask Spread*, 17 J. FIN. ECON. 223 (1986). At the domestic level, evidence shows that corporate listing decisions are consistent with the objective of increasing liquidity. *See* Yakov Amihud & Haim Mendelson, *Liquidity and Asset Prices: Financial Management Implications*, 17 FIN. MGMT. 5 (1988).

22. *See* K.C. Chan et al., *Information, Trading and Stock Returns: Lessons from Dually-Listed Securities*, 20 J. BANKING & FIN. 1161 (1996).

Increased Shareholder Base

By cross-listing its stocks, a firm could expand its potential investor base more easily than if it traded on a single market. Cross-listing brings foreign securities closer to potential investors and increases their awareness of investment opportunities, which could lower expected returns.[23] In business management terminology this aspect is called "firm visibility"—a broad notion encompassing frequent mention of the firm in the financial press and closer monitoring of its securities by analysts.

Visibility and Marketing

The putative benefits of increased visibility in the host country exceed the anticipated benefits of shareholder base increase. In addition to greater demand for its stock, listing a corporation's stock abroad provides the company with greater access to foreign product markets and facilitates selling debt in the foreign country.[24] A company becomes more credible by providing information to the local capital market because the continuous flow of information allows the capital market to make quicker and more accurate decisions.[25]

Technical Issues

Even where feasible, effecting a securities transaction abroad is still more complicated and expensive than doing so domestically. Cross-listing can improve a firm's ability to engage in structural transactions abroad such as foreign mergers and acquisitions, stock swaps, and tender offers.[26] Moreover, cross-listing also facilitates and enhances the attractiveness of employee stock ownership plans (ESOPs) of large multinational corporations. Local listing in the foreign market provides foreign employees with an accessible exit mechanism for their stocks.

B. Corporate Governance

The notion that issuers may want to improve their corporate governance by subjecting themselves to a better regulatory regime through cross-listing is appealingly elegant. Yet it was only in the late 1990s that theories about legal and governance implications of cross-listing were first articulated in detail. An early article by this author puts forth a general model of the interaction between legal

23. *See* Robert Merton, *Presidential Address: A Simple Model of Capital Market Equilibrium with Incomplete Information*, 42 J. FIN. 483 (1987).

24. *See* Kent H. Baker, *Why U.S. Companies List on the London, Frankfurt, and Tokyo Stock Exchanges*, 6 J. INT'L SEC. MARKETS 219, 221 (1992).

25. *See* Edward B. Rock, *Greenhorns, Yankees, and Cosmopolitans: Venture Capital, IPOs, Foreign Firms, and U.S. Markets*, 2 THEORETICAL INQUIRIES L. 711 (2001) (discussing foreign listing by Israeli firms); EDWARD B. ROCK, COMING TO AMERICA? VENTURE CAPITAL, CORPORATE IDENTITY AND U.S. SECURITIES LAW (University of Pennsylvania Institute for Law & Economics, Research Paper 02-07, 2002).

26. *See* G. Andrew Karolyi, *Daimler Chrysler AG, The First Truly Global Share*, 9 J. CORP. FIN. 409 (2003).

regimes following a cross-listing.[27] By cross-listing the issuer may opt into another securities regulation regime but does not sever legal ties to its home country. The outcome is a rather complex legal regime in which some components may bring about an improvement in the composite regime governing the issuer but others may erode its effectiveness. There is no reason to assume *a priori* that cross-listing would entail an improvement in issuers' corporate governance. Inferior legal provisions in the host market may have a dominant effect on the issuer.

In an oft-cited article, Jack Coffee sets forth an argument known as the "bonding hypothesis." Coffee argues that foreign firms actually use a listing on an American market to bond their insiders to better governance standards:

> Large firms can choose the stock exchange or exchanges on which they are listed, and in so doing can opt into governance systems, disclosure standards, and accounting rules that may be more rigorous than those required or prevailing in their jurisdiction of incorporation . . . [T]he most visible contemporary form of migration seems motivated by the opposite impulse: namely, to opt into higher regulatory or disclosure standards and thus to implement a form of "bonding" under which firms commit to governance standards more exacting than that of their home countries.[28]

Coffee further proposes that as foreign issuers migrate to list in U.S. markets and become subject to its standards, the relative importance of variations among the corporate laws of different countries should decline. Moreover, "the application of U.S. securities law, or some 'harmonized' model largely based on it, would instead impose transparency and significantly constrain opportunism by controlling shareholders."[29] Accordingly, markets in countries whose laws provide better protection to minority shareholders, such as the United States and the United Kingdom, will attract firms with dispersed ownership, while markets in low-corporate governance countries will trade shares of firms with concentrated ownership.[30] Edward Rock identifies the structure of the American secur-

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27. *See* Licht, *supra* note 8, at 617-21.

28. Coffee, *supra* note 8, at 651-52. The idea of using stock exchange listing as a mechanism for bonding to a different, arguably better, governance regime first appeared in a fully domestic context in the United States. *See* Jeffrey N. Gordon, *Ties that Bond: Dual Class Common Stock and the Problem of Shareholder Choice*, 76 CAL. L. REV. 3, 9, 66-68 (1988) ("insiders who seek to lower the cost of capital will find it valuable to bond a promise that the firm's single class capital structure will not be renegotiated . . . . the NYSE [one-share-one-vote listing] rule is the only secure bond available for such a promise."). Later developments in the saga of the one-share-one-vote rule have proven, however, that stock exchanges' bonding function is rather flimsy. America's national markets failed to live up to the challenge of preferring investor-protecting rules to management-friendly ones. This story has been recounted several times in the legal literature, but most of the accounts appeared before the crisis was fully resolved. These developments are discussed in Edward B. Rock, *Securities Regulation as Lobster Trap: A Credible Commitment Theory of Mandatory Disclosure*, 23 CARDOZO L. REV. 675, 698-700 (2002).

29. Coffee, *supra* note 8, at 652.

30. *Id.* It is not quite clear why Coffee mentions U.K. markets together with U.S. markets as potential vehicles for piggybacking. Cross-listing on the London Stock Exchange does not involve material changes in disclosure duties on behalf of the issuer or its management. Moreover, even the theoretical threat of class litigation which exists in the United States does not apply in the United Kingdom, in which class actions are underdeveloped. As a result, neither substantive law nor enforcement mechanisms are likely to engender corporate governance improvements.

ities regulation regime as a potential bonding mechanism. Rock argues that it has a characteristic "lobster trap" structure: easy to enter voluntarily but hard to exit. These features are necessary if disclosure regulation is to aid issuers in making a serious commitment to complete and continuous future disclosure.[31]

Recently, Coffee modified his theory in light of international stock market developments and empirical research.[32] This version also envisions the possibility of a dual-equilibrium global environment, in which "high disclosure" exchanges would serve as regional "super-markets," providing bonding services to high-quality issuers. However, firms less interested in attracting minority investors, but still desiring some degree of liquidity, might trade only on lower-disclosure exchanges.[33] The crucial question is what mechanism could support the high disclosure, race-for-the-top equilibrium? Again, the theoretical answer is market liquidity. Uninformed public investors would flock to markets where they are better protected, leading to large liquidity pools.

Theoretical and empirical research on cross-listing concentrates on firms and stock exchanges as the actors that interact in the global market for cross-listings. Such research analyses are misleadingly partial. The key weakness in the basic bonding theory is that it links the interests of issuers with those of insiders in decision-making positions, including managers and controlling shareholders, and hence underestimates the potential for insiders' opportunism. In particular, little attention has been paid to the possible role of managerial opportunism in company decisions regarding whether to cross-list and on which destination markets. More recent analyses, however, better address this issue.[34]

The central insight here is that agents make corporate decisions with regard to cross-listing. Agency theories imply that such agents do not behave altruistically for the benefit of the corporation or its shareholders. Company insiders in decision-making positions cannot be expected to remain agnostic to legal duties pertaining to them individually.[35] Examples of such issues include regulation of self-dealing and affiliated party transactions, disclosure of top executive remuneration on an individual basis,[36] and opportunities to engage in insider trading with impunity.

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31. Rock, *supra* note 28, at 686-90.

32. John C. Coffee, *Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757 (2002).

33. *Id.* at 1816.

34. *See* Steven Huddart, John Hughes & Markus Brunnermeier, *Disclosure Requirements and Stock Exchange Listing Choice in an International Context*, 26 J. ACCT. & ECON. 237 (1999); OREN FUERST, A THEORETICAL ANALYSIS OF THE INVESTOR PROTECTION REGULATIONS ARGUMENT FOR GLOBAL LISTING OF STOCKS 3 (Int'l Center for Fin. at Yale, Working Paper, 1998), *available at* http://papers.ssrn.com/sol3/papers.cfm?/abstract_id=139599; Stulz, *supra* note 19; THOMAS J. CHEMMANUR & PAOLO FULGHIERI, CHOOSING AN EXCHANGE TO LIST EQUITY: A THEORY OF DUAL LISTING, LISTING REQUIREMENTS, AND COMPETITION AMONG EXCHANGES (Working Paper, 2001); *see also* Carmine DiNoia, *Competition and Integration Among Stock Exchanges in Europe: Network Effects, Implicit Mergers and Remote Access*, 7 EUROPEAN FIN. MGMT. 39 (2001).

35. Licht, *Genie in a Bottle*, *supra* note 10, at 88-97.

36. A special aspect of this issue that came to the forefront during the 2002 corporate governance scandal in the United States is the disclosure of top executive stock option plans. *See* Lucian Arye Bebchuk, Jesse M. Fried & David I. Walker, *Managerial Power and Rent Extraction in the*

Insiders have incentives to prefer their own self-interest over the interest of their company when deciding to cross-list. Even assuming mangers have substantial holding of their company's stock and options and enjoy the increase in firm value, the benefits from cross-listing inure to the entire class of shareholders, creditors, etc., while the costs are borne entirely by the insiders. Put differently, insiders alone lose opportunities to derive private benefits from the corporation, while the entire corporate entity enjoys the value increase consequent to this loss.[37]

The upshot of this reasoning is that cross-listing and bonding may not overlap. When the foreign market effectively imposes better corporate governance on foreign issuers, managers may choose to cross-list their firm in this market to exploit the financial and other business benefits of such a transaction, while foregoing expected private benefits. In other cases, cross-listing may not entail corporate governance improvements. Indeed, cross-listing could then be used to avoid a more stringent regime; piggybacking may lead to a race for the bottom.

Whether issuers seek or avoid markets that offer better governance regimes is debatable. But to empirically resolve this question raises considerable challenges. Many different motivations may affect the cross-listing decision and make it difficult to discern the precise effect of each motivation. Researchers have employed different methodologies for investigating cross-listing, often posing research questions that were not sensitive to the issue. A sober analysis, especially of recent unpublished studies, indicates that the bonding hypothesis does not receive support from the extant empirical evidence while the avoiding hypothesis does. Evidence also supports the managerial opportunism hypothesis.[38]

When surveyed, managers and other decision-makers of actual and would-be cross-listed corporations all around the world cite business issues, primarily increased visibility in the destination market, as the dominant reason for effecting a cross-listing. When asked about factors that militate against cross-listing, respondents unanimously cite increased disclosure requirements as the most serious obstacle.[39] Studies that investigate regularities in firms' choice of destination markets ("migration studies") offer consistent results. Firms were more

Design of Executive Compensation, 69 U. CHI. L. REV. 751 (2002) (surveying theory and evidence and arguing that managerial opportunism is a major factor in such plans).

37. This logic was generalized with the concept of "significantly redistributive issues" by Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1437, 1461-67 (1992).

38. For a comprehensive critical survey, *see* Licht, *Bonding or Avoiding*, *supra* note 10.

39. *See* James A. Fanto & Roberta S. Karmel, *A Report on the Attitudes of Foreign Companies Regarding a U.S. Listing*, 3 STAN. J. L. BUS. & FIN. 51 (1997). *See also* Usha R. Mittoo, *Managerial Perceptions of the Net Benefits of Foreign Listing: Canadian Evidence*, 4 J. INT'L FIN. MGMT. ACCT. 40 (1992) (noting a similar finding for Canadian firms listed on U.S. or U.K. markets); KARL LINS, DEON STRICKLAND & MARC ZENNER, DO NON-U.S. FIRMS ISSUE STOCK ON U.S. EQUITY MARKETS TO RELAX CAPITAL CONSTRAINTS? (University of North Carolina, Working Paper, 2000); Franck Bancel & Usha R. Mittoo, *European Managerial Perceptions of the Net Benefits of Foreign Stock Listings*, 7 EUR. FIN. MGMT. 213 (2001); NOBUYOSHI YAMORI & TAIJI BABA, JAPANESE MANAGEMENT VIEWS ON OVERSEAS EXCHANGE LISTINGS: SURVEY RESULTS (Center for Pacific Basin Monetary and Economic Studies, Working Paper PB99-05, 1999); ROBERT BRUNNER, SUSAN CHAPLINSKY

likely to cross-list on stock exchanges with lower disclosure levels and in countries that represent larger markets for the firms' products or where their peers were listed. This finding is in line with the visibility rationale, which proposes that firms seek greater public exposure in the destination market.[40] Recent studies that have taken novel empirical approaches to isolating the effects of managerial interests suggest that insiders may take advantage of cross-listings to derive private benefits.[41]

C. *Informational and Cultural Distance*

Important as it may be for policy-makers, the bonding-or-avoiding debate does not exhaust the richness of cross-listing as a legally-relevant phenomenon. Whether firms are driven by bonding or by avoiding motivations is ultimately an empirical question. The two competing hypotheses are not mutually exclusive in theory. Although the majority of issuers apparently behave according to the avoiding theory, some issuers may want to take advantage of destination-markets' stringent regulatory regimes, in line with the bonding theory. This begs a question not yet fully explored in the legal and finance literature: Can they do this? Both the bonding and the avoiding hypotheses share an implicit assumption that the regulatory regime in the destination market, regardless of its content, would apply with equal effectiveness as compared to the home-market regime. Under the bonding hypothesis, the bonding "sticks" to the effect of improving firms' corporate governance. Under the avoiding hypothesis, the bonding would stick and is therefore being avoided.

& LATHA RAMCHAND, COMING TO AMERICA: A CLINICAL STUDY OF IPOS IN THE U.S. BY FOREIGN FIRMS (Working Paper, 1999).

40. *See* Marco Pagano, Ailsa A. Roell & Josef Zechner, *The Geography of Equity Listing: Why Do Companies List Abroad?*, 57 J. FIN. 2651 (2002); Marco Pagano, Otto Randl, Ailsa A. Roell & Josef Zechner, *What Makes Stock Exchanges Succeed? Evidence from Cross-Listing Decisions*, 45 EUR. ECON. REV. 770 (2001) [hereinafter *Stock Exchange Success*]. For early pioneering works in this line see Shahrokh M. Saudagaran & Gary C. Biddle, *Foreign Listing Location: A Study of MNCs and Stock Exchanges in Eight Countries*, 26 J. INT'L BUS. STUD. 319 (1995); Shahrokh M. Saudagaran & Gary C. Biddle, *Financial Disclosure Levels and Foreign Stock Exchange Listing Decisions*, 4 J. INT'L. FIN. MGMT. & ACC. 106 (1992); Gary C. Biddle & Shahrokh M. Saudagaran, *Foreign Stock Listings: Benefits, Costs, and the Accounting Policy Dilemma*, 5 ACCT. HORIZONS 69 (1991); Gary C. Biddle & Shahrokh M. Saudagaran, *The Effects of International Disclosure Levels on Firms' Choices among Alternative Foreign Stock Exchange Listings*, 1 J. INT'L. MGMT. & ACCT. 55 (1989); Shahrokh M. Saudagaran, *An Empirical Study of Selected Factors Influencing the Decision to List on Foreign Exchanges*, 19 J. INT'L BUS. STUD. 101 (1988).

41. *See* Jordan I. Siegel, *Can Foreign Firms Bond Themselves Effectively By Renting U.S. Securities Laws?*, J. FIN. ECON. (forthcoming 2004); ANNALISA RUSSINO, SALVATORE CANTALE & ARTURO BRIS, MARKET SEGMENTATION, CORPORATE CONTROL, AND FOREIGN LISTING (Working Paper, 2001); WARREN BAILEY, G. ANDREW KAROLYI & CAROLINA SALVA, THE ECONOMIC CONSEQUENCES OF INCREASED DISCLOSURE: EVIDENCE FROM INTERNATIONAL CROSS-LISTINGS (Working Paper, 2002); NUNO C. MARTINS, ASYMMETRY OF INFORMATION IN EMERGING MARKETS: SHOULD A FIRM ISSUE ITS SECURITIES LOCALLY OR ABROAD? (Working Paper, 2002). The study of WILLIAM A. REESE, JR. & MICHAEL S. WEISBACH, PROTECTION OF MINORITY SHAREHOLDER INTERESTS, CROSS-LISTINGS IN THE UNITED STATES, AND SUBSEQUENT EQUITY OFFERINGS (Working Paper, 2001), who argue for the bonding hypothesis, in my mind does not support their interpretation and in fact provides evidence to the contrary. *See* Licht, *Bonding or Avoiding*, *supra* note 10.

Existing literature on corporate governance improvement through private action (cross-listing) reflects an assumption that legal transplantation is a relatively straightforward feat. As noted in the introduction, experience with corporate governance reform through public action (for example, legislative reforms) has shown otherwise. The simple fact that laws work well in certain countries does not ensure they will work well, if at all, in other countries. Similarly, there is no *a priori* support for the assumption that host-market regulations would effectively govern foreign issuers' affairs. The high diversity of corporate governance regimes around the world in fact suggests that some host-market systems would work better than others—that is, they would fit better.

Cross-listing transactions provide a rare opportunity to investigate the intuitive proposition that the "goodness of fit" among legal transplants varies across legal regimes in correlation with the proximity between them. Because there are scores of issuers who have made the decision whether and where to cross-list, it is possible to search for regularities in cross-listing patterns that may bear on this question. In what follows, I look into some recent empirical studies that present preliminary evidence in support of this proposition. These studies point to informational and cultural distance as the dominant factors in cross-listing patterns around the world.

Pagano, Randl, Roell, and Zechner investigate how the actual cross-listing choices of European companies correlate with specific features of exchanges and countries.[42] Consistent with the visibility rationale for cross-listing, companies are found to be attracted to larger markets than their home exchanges and to markets on which other firms from the same industry are listed. Destination countries have on average lower accounting standards than origin countries, confirming the findings of other studies mentioned above. Notwithstanding their geographically limited sample, Pagano et al. are able to demonstrate that companies tend to list more frequently within groups of countries that are culturally similar. These researchers identify three groups of countries: one including Austria, Germany, the Netherlands, and Switzerland; another including Belgium, France, Italy, and Spain; and a third including Great Britain and the United States; Sweden is not assigned to any group. These groups are reminiscent of cultural regions identified in the work of Geert Hofstede: Germanic, (economically developed) Latin, Anglo, and Nordic.[43]

Using a nearly comprehensive data set of foreign listings in 1998, Sarkissian and Schill find strong evidence that host-home cross-listing activity clusters regionally.[44] Geographic proximity and other variables of familiarity such as trade, common language, colonial ties, and similar industrial structure play an important role in the choice of overseas host market, more significant than fi-

42. Pagano et al., *Stock Exchange Success*, *supra* note 40. The sample covered all the first cross-listing effected in 1986-97 by both financial and non-financial companies listed domestically in the main segment of the following ten exchanges: Amsterdam, Brussels, Frankfurt, London, Madrid, Milan, Paris, Stockholm, Vienna, and Zurich/Basel/Geneva.

43. *See infra* note 115.

44. *See* SERGEI SARKISSIAN & MICHAEL J. SCHILL, THE OVERSEAS LISTING DECISION: NEW EVIDENCE OF PROXIMITY PREFERENCE (Working Paper, 2001).

nancial factors.[45] The preference for familiar markets is particularly acute among firms outside the G-5 group of industrialized countries and among firms producing non-tradable goods. Firms from non-G-5 countries also tend to target overseas listings in equity markets, which are larger, more liquid, more highly capitalized, and are located in countries with higher scores on legality, meaning observance of the rule of law.[46] The top host countries are the United States, United Kingdom, Germany, Switzerland, and Luxembourg.[47]

These emerging signs of the role played by cultural proximity in foreign listing are corroborated by research that yields similar results regarding cross-border portfolio investment. Portes and Rey[48] show that cross-border equity transaction flows are explained by a "gravity model,"[49] in which market size, efficiency of the transaction technology, and distance are the most important determinants. The significant negative role of geographical distance is puzzling at first glance, since, unlike goods, securities are "weightless." Portes and Rey surmise that geographical distance hinders economic exchanges due to cultural affinities that affect economic relations through their contribution to informational frictions.[50] These results indicate that the geography of information and informational friction dominate other factors—including financial motivations—in the distribution of cross-border securities transactions.[51]

II.
UNDERSTANDING CULTURAL DISTANCE

A seminal finance model by Robert Merton, which underlies many cross-listing studies, derives its results from the premise that investors can invest only

45. Little support is found for the hypothesis that overseas listing firms are primarily motivated by diversification gains. Rather than maximizing the diversification gain by listing in markets with little economic correlation with one's home market, cross-listing activity is more common across markets for which return correlation is relatively high. *Id.* at 18.

46. The rule of law measure is based on the commonly-used index of the International Country Risk Guide (ICRG) that gauges the incidence of crime, enforceability of private and government contracts, and respect for property rights. The finding cited in the text is not surprising in light of the fact that the top host countries are also among the top scorers on the rule of law index.

47. Sarkissian and Schill argue that the stringency of disclosure requirements in a foreign country appears to attract foreign country listings, seemingly in contrast to findings by Saudagaran and Biddle, *supra* note 40, and Pagano et al., *supra* note 42. This contradiction could stem from the peculiar way in which Sarkissian and Schill gauge disclosure stringency. Unlike the former researchers, who use indices of disclosure requirements, the latter use a dummy variable that indicates whether the host country insists that the issuer use a different set of accounting standards than the set used in its home country. Although this yardstick does capture a sense of stringency in regulation, it does not reflect any improvement in the informativeness of the required disclosure system.

48. *See* RICHARD PORTES & HELENE REY, THE DETERMINANTS OF CROSS-BORDER EQUITY FLOWS: THE GEOGRAPHY OF INFORMATION (University of California, Berkeley, Center for International Development & Economic Research (CIDER), Working Paper C00-111, 2000).

49. A "gravity model" is commonly used for trade in goods. It explains trade between countries i and j by the masses (gross domestic products) and distance; more elaborate versions include cultural and other variables. *Id.* at 1, n.1.

50. *See* James E. Rauch, *Business and Social Networks in International Trade*, 39 J. ECON. LIT. 1177 (2001).

51. Portes and Rey's results should be read in light of a large literature that documents a strong home bias in international investment. *See infra* pp. 58-61.

in firms of which they know.[52] The foregoing discussion suggests that Merton's model now has an augmented version. Investors not only buy securities of firms which they know; they prefer securities of firms which they know better. This phenomenon is broader than the well-known home bias.[53] The types of familiarity that affect cross-listing and cross-border trading relate to geographical proximity, common historical heritage, and cultural proximity.

The evidence surveyed in the prior discussion demonstrates that foreignness is not a dichotomous trait. Rather, for a particular destination market, such as the NYSE, certain issuers may be "more foreign" than others. The degree of foreignness depends on a number of factors beyond nationality. Geographical proximity and historical heritage, which may include legal transplantation by colonial rulers, are straightforward concepts that do not need much elaboration. In comparison, cultural proximity is more elusive. Culture is a rich concept with many alternative definitions. This section explores the ways in which "cultural distance" between countries can be explicated and related to corporate governance, beyond just pointing out idiosyncratic features but without resorting to detailed descriptions.[54] Korean notions of Confucian corporate governance provide the basic reference case in this article. Specifically, the focus is on the possibility of enhancing Korean corporate governance with North American-inspired elements through either cross-listing or direct legal reform.

A. Context: Korean Corporate Governance

1. A Brief Economic History

Korea's modern economic history begins in 1960.[55] After the rise of General Park Chung Hee to power in 1961, the Korean government opted for centralized economic planning. Having forced prominent businesspeople to turn in their equity shares in banks to the state, the government was also in control of commercial banks. Nationalistic sentiments and private firms' lack of reputation led the government to reject foreign direct investment (FDI) for financing enterprises that would come under foreign control. Instead, the government relied on foreign loans guaranteed by state-owned banks. In parallel, the government also used a variety of measures to prefer certain firms to others and direct them to specific industries. The debt-equity ratio of firms soared to over 300 percent in the 1970s. In 1972, the government had to bail out the debt-burdened corporate sector, thus violating creditors' rights and aggravating moral hazard. Another round of directed financial support to select firms ensued and gave rise to the swelling of the *chaebols* to mammoth sizes: the *chaebol* is a group of

52. Merton, *supra* note 23.

53. *See infra* pp. 58-61.

54. This is the method anthropologists tend to prefer. *See* CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES: SELECTED ESSAYS 26-28 (1973) (advocating the study of cultures through "thick description").

55. The following draws on BYUNG-NAK SONG, THE RISE OF THE KOREAN ECONOMY ch. 3 (2nd ed. 1997); PHILLIP WONHYUK LIM, THE EVOLUTION OF KOREA'S DEVELOPMENT PARADIGM: OLD LEGACIES AND EMERGING TRENDS IN THE POST-CRISIS ERA (ADB Institute, Working Paper 21, 2001).

specialized companies with interrelated management servicing one another. From 1980 to 1997, this trend continued with few significant changes. Although the democratization of South Korea in 1987 brought an end to direct control of business, the strong emphasis on export, the rejection of FDI, and the implicit protection against bankruptcy continued. The government did not directly address problems of moral hazard and outright corruption.[56]

During the three decades preceding the 1997 financial crisis, the Korean economy grew from that of a poor developing country to one of the leading world economies.[57] In 1996, Korea joined the prestigious OECD club of wealthy nations, after taking several measures to liberalize its capital markets. During the summer of 1997, Thailand was hit by a financial crisis that stemmed from foreign investors' loss of confidence. The crisis quickly spread to the entire East Asian region. Korea was severely hit by this crisis, but there is wide agreement that its structural problems existed well before the crisis hit. At that time, the debt-equity ratio of the top 30 *chaebols*, which dominated a huge portion of the economy, had reached 519 percent.

With its foreign-exchange reserves nearly depleted, Korea applied to the International Monetary Fund (IMF) in November 1997, for a U.S. $58 billion bailout package. The Korea-IMF Memorandum on the Economic Program provided for a wide range of corrective measures related to macroeconomic policy, fiscal policy, and financial and corporate sector restructuring, with a strong emphasis on corporate governance reform. This was followed by subsequent memoranda, in line with the IMF's conditionality policy.[58] However, the economy rebounded far more quickly than anticipated and by 2001 Korea had fully repaid its rescue loan.

2. *The Chaebol*

The hallmark of Korean corporate governance[59] is the *chaebol.* This corporate structure was first introduced in Korea by the Japanese colonial

56. LIM, *supra* note 55, at 16.

57. The following draws on HAL S. SCOTT & PHILIP A. WELLONS, INTERNATIONAL FINANCE: TRANSACTIONS, POLICY, AND REGULATION ch. 21 (5th ed. 1998); Hwa-Jin Kim, *Taking International Soft Law Seriously: Its Implications for Global Convergence in Corporate Governance*, 1 J. KOREAN L. 1 (2001); HUN-JOO PARK, AFTER *Dirigisme*: Globalization, Democratization, and the Paternalistic State In Korea (Working Paper, 2000).

58. Under the conditionality policy, grant of foreign aid by the IMF is conditioned on the recipient country's taking corrective measures. For an historical review of this policy, see Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions*, 41 HARV. INT'L L.J. 529, 569-76 (2000).

59. Apparently, the term "corporate governance" does not have an equivalent in the Korean language. A series of symbols in *Hangul* representing "ownership structure" is the closest term available for discussing the subject. *See* Jill Frances Solomon, Aris Solomon & Chang-Young Park, *The Evolving Role of Institutional Investors in South Korean Corporate Governance: Some Empirical Evidence*, 10 CORP. GOVERNANCE: INT'L REV. 211, 211 (2002). This lack of direct translation may be a minor coincidence. But the fact that a certain language lacks a term for a social concept laden with connotations such as corporate governance could indicate that this concept may have a more marginal role in people's thinking. Maybe this is another coincidence, but one may note that Japanese lacks a word for accountability, using the transliteration *akauntabiritii* instead. *See* AMIR N. LICHT, ACCOUNTABILITY AND CORPORATE GOVERNANCE (Working Paper, 2002).

rulers.[60] The initial wealth of the *chaebols* originated from the government sale of properties owned by Japanese colonizers and of other resources to their founding families.[61] However, the government prohibited the *chaebols* from owning private banks, partly in order to increase its own leverage over the banks in areas such as credit allocation.

A characteristic feature of the *chaebols* is that they are largely controlled by their founding families. Family control over the *chaebol* does not rest on direct holding of majority blocks of shares. Rather, *chaebols* exhibit intricate networks of cross-holdings among numerous companies such that family members enjoy effective control without owning even half of the cash flow rights. Such holding structures are known to engender severe agency problems.[62] As part of the IMF-mandated reforms in the wake of the 1997 crisis, controlling families were required to reduce their holdings in the largest *chaebols*. Nevertheless, while the equity share of family members declined from 14 percent to 4.5 percent by 2000, the total in-group holding remained steady.[63] This renders outside challenge to the management control of the major families virtually impossible.[64]

The strong familial character of the *chaebols* manifests itself in numerous aspects of their management and operation. At the head of *chaebols* stands the chairman, who in the past also used to be the head of the founding family; however, the chairman does not formally hold a directorship position in many group companies.[65] The chairmanship position traditionally moved to the chairman's eldest son or to another close kin.[66] The board of directors used to be composed of only executive directors practically appointed by the chairman. Other top positions in the *chaebols* were generally staffed with members of the extended family. Professional managers too are more concerned with satisfying the dominant family than meeting the needs of the firm or its shareholders.[67] Organization and management in the *chaebols* are extremely hierarchical, mir-

60. Literally meaning "business conglomerate," *chaebol* is the Korean pronunciation of the Chinese symbols that Japanese pronounce *Zaibatsu*. Although it is widely used by non-Koreans, Song notes that when Koreans use the word *chaebol* it is in a disparaging sense (due perhaps to its colonial lineage). SONG, *supra* note 55, at *x*.

61. SANG-WOO NAM, BUSINESS GROUPS LOOTED BY CONTROLLING FAMILIES, AND THE ASIAN CRISIS 13 (ADB Institute, Working Paper 27, 2001).

62. *See* Lucian A. Bebchuk, Reinier Kraakman & George Triantis, *Stock Pyramids, Cross-Ownership and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash-Flow Rights*, *in* CONCENTRATED CORPORATE OWNERSHIP 295 (Randall Morck ed., 2000).

63. In tandem, the limit on a *chaebol* member firm's holding of affiliated company shares had been moderated from 25 to 40 percent of the company's net assets. Letter from Kon Sik Kim to Author (Oct. 3, 2002) (on file with author).

64. NAM, *supra* note 61, at 18. *See also* DAEHONG T. JAANG, KYUNG-SOO KIM, WOO TACK KIM & SANGSOO PARK, CROSS SHAREHOLDING AND CORPORATE FINANCIAL POLICY: THE CASE OF KOREA (Working Paper, 2002) (explaining that cross-holdings in the *chaebols* allow the heads of the founding families to exert dominant control power without supply of real capital).

65. *Id.* at 20.

66. NAM, *supra* note 61, at 21 table 3 (summarizing data about succession patterns for *chaebol* chairmanship in the largest *chaebols* until 1996; out of 35 such successions, only one was to a professional manager and 34 were to family members, out of which 20 were to the eldest son.)

67. *See* Curtis J. Milhaupt, *Privatization and Corporate Governance in a Unified Korea*, 26 IOWA J. CORP. L. 199, 206 (2001).

roring the structure of Korean families and clans. Formal control mechanisms were absent, as the statutory-mandated auditors were never truly functional. This authoritarian, opaque, and familial management style was in fact valued and envied by many Koreans, according to some accounts.[68] Commentators unanimously relate these features to Korea's long Confucian heritage.[69]

3. *The Legal Environment*

The legal infrastructure for corporate governance in Korea rests on its Commercial Code of 1962 (the Code).[70] Continuing the historical influence of Japan over Korea, the Korean Code mirrors the Japanese Commercial Code of 1950. The Japanese Code is an amalgam of a German commercial code and numerous amendments that were introduced into Japanese law by the American occupation forces in the late 1940s. Another statutory pillar for corporate governance is the Korean Securities and Exchange Act, which has a similar Japanese-American heritage (but without German roots). The present article will only briefly highlight some of the major changes Korean law has undergone in recent years.[71] Already in 1995 (effective October 1996)—and well before the 1997 financial crisis occurred—Korea amended the Code in various parts to enhance the international competitiveness of Korean companies.

After Korean corporate governance was cited by the IMF as one of the major causes of the 1997 crisis,[72] additional rounds of amendments took place between 1998 and 2000. These amendments were primarily inspired by American law and American practices, although these were not the only sources.[73] In 1999, the OECD completed a code of corporate governance principles intended

68. SONG, *supra* note 55, at 194 (describing how the chairman of the Hyundai group used to open his working day with a breakfast together with his four Hyundai top executive sons).

69. *See infra* subsection (4).

70. This section draws on Joongi Kim, *Recent Amendments to the Korean Commercial Code and their Effects on International Competition*, 21 U. PA. J. INT'L ECON. L. 273 (2000); Kim, *supra* note 57; KON SIK KIM & JOONGI KIM, REVAMPING FIDUCIARY DUTIES IN KOREA: DOES LAW MATTER IN CORPORATE GOVERNANCE? (Working Paper, 2002).

71. For detailed analyses, see *supra* note 70. *See also* Jooyoung Kim & Joongi Kim, *Shareholder Activism in Korea: A Review of How PSPD Has Used Legal Measures to Strengthen Korean Corporate Governance*, 1 J. KOREAN L. 51 (2001); Hwa-Jin Kim, *Toward the "Best Practice" Model in a Globalizing Market: Recent Developments in Korean Corporate Governance*, 2 J. CORP. L. STUD. 345 (2002).

72. *See* TOMAS J.T. BALINO & ANGEL UBIDE, THE KOREAN FINANCIAL CRISIS OF 1997: A STRATEGY FOR FINANCIAL SECTOR REFORM (IMF Working Paper, WP/99/28, 1999); Magdi Iskander et al., *Corporate Restructuring and Governance in East Asia*, 36(1) FIN. & DEV. 42 (1999), *available at* http://www.imf.org/external/pubs/ft/fandd/1999/03/iskander.htm.

73. A contested document in this regard was an expert committee report commissioned by the Ministry of Justice and headed by Bernard Black, which proposed a very long list of amendments. CORPORATE GOVERNANCE IN KOREA AT THE MILLENNIUM: ENHANCING INTERNATIONAL COMPETITIVENESS, Final Report and Legal Reform Recommendations to the Ministry of Justice of the Republic of Korea (May 15, 2000), *available at* http://papers.ssrn.com/paper.taf?abstract _id=222491. This report has met with strong objection from the business sector and, as of August 2002, was not implemented. *See* Stephen J. Choi & Kon-Sik Kim, *Establishing a New Stock Market for Shareholder Value Oriented Firms in Korea*, 3 CHI. J. INT'L L. 277 n.22 (2002); Letter from Kon-Sik Kim, Seoul National University, to Author, Aug. 20, 2002 (on file with author).

for use both by its members and every other country.[74] These principles were adopted by the IMF and the World Bank as a standard recommended platform for corporate governance reform;[75] they were also adopted by CalPERS to guide its international investment strategy.[76] The core principle of these projects is the promotion of "the equitable treatment of shareholders"[77]—something that few would object to. Evidence from Korea showed that minority shareholders were indeed exploited by the *chaebols*' controlling families.[78]

Although the OECD Principles are non-binding, there is considerable convergence toward them as an optimal corporate governance framework.[79] In accordance with the Principles, the major amendments to the Korean laws included (1) introducing a formal fiduciary duty of loyalty;[80] (2) introducing an option for companies to establish audit committees with a majority of non-executive directors; (3) establishing various minority shareholder rights, including a reduction in the minimum shareholding required for filing derivative suits; (4) requiring listed companies to have at least one outside director out of every four; (5) introducing cumulative voting; (6) requiring shareholder approval for major transactions.[81]

It is too early to judge the success of these major legislative reforms. Naturally, there has been strong objection to the reforms from the *chaebol* controlling families.[82] A bill to establish shareholder class actions failed to pass the legislative body,[83] and a comprehensive reform plan commissioned by the Ministry of Justice was put on ice.[84] On the bright side, the Korean courts recently handed down several landmark decisions, imposing liability on managers for breach of fiduciary duty.[85] The People's Solidarity for Participatory Democracy (PSPD), an important civic group campaigning for corporate governance reform, has taken various steps to block dubious transactions in the Hyundai group.[86] On the other hand, at least several reforms have been implemented according to the letter of the law but quite against its spirit. For example, some firms staffed the

74. OECD PRINCIPLES, *supra* note 5.

75. ORGANIZATION FOR ECONOMIC DEVELOPMENT AND CO-OPERATION, A FRAMEWORK FOR CO-OPERATION BETWEEN THE OECD AND THE WORLD BANK (1999). A related project of "best corporate governance principles" is reflected in Gainan Avilov et al., *General Principles of Company Law for Transition Economies*, 24 J. CORP. L. 190 (1999).

76. For a review, see Amir N. Licht, *The Mother of All Path Dependencies: Toward a Cross-Cultural Theory of Corporate Governance Systems*, 26 DEL. J. CORP. L. 147, 154-65 (2001).

77. OECD PRINCIPLES, *supra* note 5, at 6.

78. *See, e.g.*, NAM, *supra* note 61; Milhaupt, *supra* note 67, at 206; KEE-HONG BAE, JUN-KOO KANG & JIN-MO KIM, TUNNELING OR VALUE ADDITION? EVIDENCE FROM MERGERS BY KOREAN BUSINESS GROUPS (Working Paper, 2000), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=246621.

79. *See*, Kim, *supra* note 57.

80. For a thorough discussion of fiduciary duties, see KIM & KIM, *supra* note 70.

81. *See* Hwa-Jin Kim, *supra* note 71, at 7-12.

82. *See* Black, *supra* note 1, at 542-43; CHOI & KIM, *supra* note 73, at 6.

83. *See* Hwa-Jin Kim, *supra* note 71, at 9.

84. *See supra* note 73.

85. *See* KIM & KIM, *supra* note 70.

86. *See* Jill Frances Solomon, Aris Solomon & Chang-Young Park, *A Conceptual Framework for Corporate Governance Reform in South Korea*, 10 CORP. GOVERNANCE: INT'L REV. 29, 34-35 (2002); Lim, *supra* note 55, at 30.

required quota of outside directors and newly-established audit committees with people close to the controlling families. At times, even the government seemed to disregard the basic principles of corporate governance and encouraged the founder families to revert to their old ways by urging profitable companies to rescue their "brother" companies in distress.[87] Overall, "the government's interest in undertaking further reforms now seems on the wane."[88]

At least regarding cross-listing, however, the Korean government seems determined to promote reform. As part of modernizing Korea's equity market, and in tandem with establishing KOSDAQ as a market for start-up companies, the government took steps to allow Korean issuers to cross-list their stocks on nine foreign stock markets.[89] Among the reasons cited by the government for the new rules was "enhancing the transparency and efficiency in management and corporate governance by means of globalization of the disclosure system, accounting system and practice in the securities industry."[90] The Korean Financial Supervisory Commission promulgated rules intended to equalize the information provided to the Korean market by such dual-listed issuers with the information they disclose in foreign exchanges.[91]

Korea's economic recovery came in 1999, before all the reforms were promulgated. Thus, a lingering question remains regarding any causal relations between Korea's structural and institutional problems, the reforms, and the recovery. For the present purposes, we are interested in the degree to which the reforms could diminish the virtual distance between Korea's corporate governance system and the features that may be more highly valued in international securities markets. An investigation of Korea's social infrastructure, its Confucian heritage, is the next step in this inquiry.

4. The Confucian Heritage

In brief, the Confucian ideal of social structure rests on the "Five Relationships." Formulated by classical Chinese philosophers, this concept states that there should be affection between father and son, righteousness between ruler and minister, attention to separate functions between husband and wife, proper order between old and young, and faithfulness between friends. The Confucian ethic places a unique emphasis on the family. Filial piety probably is the central value. In the traditional extended-family system, the needs of the family have priority over individual investigational needs; indeed, Korean familial relations

87. *See* LIM, *supra* note 55, at 29-30.

88. CHOI & KIM, *supra* note 73, at 6.

89. *See supra* note 13. The stock exchanges are the NYSE, NASDAQ, AMEX, and those of London, Frankfurt, Paris, Tokyo, Hong Kong, and Singapore.

90. Hwa-Jin Kim, *Improving Corporate Governance and Capital Markets Through Cross-Listing on Foreign Exchanges*, 44 KOREA SEC. DEPOSITORY Q. J. 3 (2003) (Korean) (English summary on file with author) (citing Korea Financial Supervisory Commission Internal Memo re Cross-Listing of Public Companies on Foreign Exchanges, Jan. 18, 2002 (Korean)). The government opined that "cross-listing will act as catalyst for improving the disclosure system and accounting system of the Korean companies." *Id.*

91. Kim, *supra* note 90 (citing Art. 69 para. 1 No. 18 and para. 6 of the Korea Financial Supervisory Commission Regulation on the Issuance of Securities and Disclosure).

do not draw a sharp line between members of the extended family and members of the wider clan, a patrilineal group that defines itself in terms of a common distant ancestor.[92] In terms of organization structure, Confucianism champions strict hierarchical structures. This begins with the family in which the father is the source of authority, loyalty runs to him, and responsibility for family members rests with him. This paternal hierarchy extends to other social contexts.

Confucianism was Korea's state philosophy during the reign of the Choson dynasty (1392-1910), which lasted for more than five hundred years, until Korea was colonized by Japan.[93] The country is the most ethnically homogenous country in the world;[94] it is also among the oldest continuously existing countries.[95] Compared with other countries with a Confucian heritage, Korea is said to be the most Confucian in the world.[96] It is therefore not surprising that commentators widely agree that the Korean corporate governance system reflects features of Confucian culture. It should be noted that Korea also has a significant Christian population, the largest in Asia. Some scholars claim that as a result, Korea developed a mix of the Confucian ethic and the Protestant Puritan ethic (as defined by Max Weber).[97]

B. Comparing Cultures

1. The Problem

Thus, Korea is a fascinating country with a rich culture that emphasizes the family and shares some features of its rich culture with some, but not all neighboring Asian countries. How should knowledge of Korea's cultural heritage inform foreign investors in Korean ADRs or policymakers contemplating corporate governance reform? Recall that for particular issuers, these two contexts are conceptually identical. In both cases, the established Korean corporate governance system would be enhanced with foreign elements. In the case of corporate governance, American-inspired corporate governance features are directly transplanted into Korean law. In the case of Korean ADRs, American provisions constitute an additional normative layer, as issuers become subject to (diluted)[98] U.S. disclosure rules, accounting standards, and so forth. Issuers can

92. SONG, *supra* note 55, at 55.

93. *Id.* at 10. Confucianism is often also mentioned as the state religion during that time. However, the crucial point here is its being the state philosophy. As such, Confucianism could shape secular social institutions irrespective of people's religious denomination and the degree of their religious commitment.

94. ALBERTO ALESINA ET AL., FRACTIONALIZATION 8 (NBER, Working Paper No. 9411, 2003).

95. SONG, *supra* note 55, at 10.

96. *Id.* Among other Asian countries, Japan is more culturally diverse and China has undergone periods of severe internal turmoil.

97. SONG, *supra* note 55, at 52-56 (citing TU WEI-MING, CONFUCIAN ETHICS TODAY (1984)). For Weber's viewpoint, see MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Talcott Parsons trans., 1958).

98. The U.S. disclosure regime applicable to foreign issuers is inferior to the regime that applies to domestic American issuers especially on issues of corporate governance. *See* Licht, *Bonding or Avoiding*, *supra* note 10.

even eschew the common practice among non-U.S. issuers to seek an exemption from stock-exchange listing rules on corporate governance.[99] Does Korea's culture pose a problem to such enhanced regimes?

In principle, if the incentives are correctly set, one can uphold Confucian values and still maximize shareholder wealth. The expert committee report to the Korean Ministry of Justice addressed this issue as follows:

> We believe strongly that reforms must fit within a country's existing laws and institutions. They cannot just be airlifted in from outside. . . . We don't believe that Korea's *supposed* autocratic, Confucian culture will simply shrug off measured efforts to control self-dealing and improve oversight of corporate managers. Even Confucian managers respond to incentives.[100]

Granted they do. But what may worry potential investors in Korean stocks or ADRs is that in comparison to American managers, Confucian insiders may respond to incentives differently—assuming, plausibly, that greed is universal. Korean commentators in fact voice concerns that without more, the legal reforms undertaken so far may not suffice for remedying Korea's corporate governance.[101] By analogy, any extra investor protection provided by cross-listing on an American stock market under the bonding hypothesis may also turn out to be ineffective.

The case of Korea exemplifies a general intuition among experts that culture matters for corporate governance.[102] Until recently, however, mostly anecdotes were offered to substantiate this point,[103] which clearly cannot guide

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99. *See* American Bar Association, Section of Business Law, Committee on Federal Regulation of Securities, SPECIAL STUDY ON MARKET STRUCTURE, LISTING STANDARDS AND CORPORATE GOVERNANCE 26 (May 17, 2002), cited in Coffee, *supra* note 32, at 29.

100. Black, *supra* note 1, at 545 (italics added; footnote omitted). The omitted footnote cites CRAIG P. EHRLICH & DAE-SEOB KANG, CORPORATE GOVERNANCE REFORM IN KOREA: A DESCRIPTION OF LEGAL CHANGES AND SUGGESTIONS FOR EMPIRICAL RESEARCH (Working Paper, 1999) (arguing that the IMF-mandated reforms are incompatible with Korea's Confucian culture). *See* Craig Ehrlich & Dae-Seob Kang, *U.S. Style Corporate Governance in Korea's Largest Companies*, 18 UCLA PAC. BASIN L.J. 1, 2 (2000) ("The Korean government retained a U.S. law firm and a U.S. law professor to advise it, and the new laws have imported U.S. style governance concepts. The Korean corporate culture is radically different, however, and a serious question is whether U.S. legal mechanisms can be airlifted into a Confucian culture."). Ehrlich and Kang, however, do not specify in much further detail why the Korean system should reject the proposed laws.

101. *See* CHOI & KIM, *supra* note 73, at 4 ("[T]he mere surface changes in the legal regime may not effect large changes in the overall level of protections for minority investors. Indeed, the law itself may in fact matter less. Culture, for example, may play a larger role in how often controlling shareholders and managers expropriate value from minority investors."); Park, *supra* note 57, at 25 ("The restructuring that took place both in financial and corporate sectors so far was, however, more of adjustments in 'hardware'. . . [M]ending some corporate governance laws would prove relatively easier than reforming the actual practice."); LIM, *supra* note 55, at 30 ("[T]he feudalistic infighting for corporate control at the Hyundai Group illustrated that Korean firms had changed very little with regard to corporate governance."); Kim, *supra* note 57, at 35 ("It may be at least questionable whether the OECD Principles indeed offer guide and help in dealing with the corporate governance problems in Korea.").

102. For a review, see Licht, *supra* note 76, at 160-66. *See* René M. Stulz & Rohan Williamson, *Culture, Openness, and Finance*, J. FIN. ECON. (forthcoming 2004) (citing economic historian David Landes, *Culture Makes Almost All of the Difference*, in CULTURE MATTERS 2 (Lawrence E. Harrison & Samuel P. Huntington eds., 2000)).

103. *See, e.g.*, Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 169 (1999) ("American culture, for exam-

policy formation nor investment strategies.[104] Two strands of psychological research have developed insights that should be useful for better understanding the implications of foreign corporate governance systems.[105] The next two subsections describe ways for taking up this challenge—first, with regard to cultural values, and next, with regard to cognitive styles.

2. *Value Dimensions*

Cross-cultural psychologists have made considerable advances over the last two decades toward developing a universal analytical framework for comparing cultures.[106] Defined in subjective terms, culture is the values, orientations and underlying assumptions that are prevalent among the members of a society.[107] A common postulate in cross-cultural psychology is that all societies confront similar basic issues or problems when they come to regulate human activity. The cultural responses to the basic problems that societies face are reflected in prevailing value emphases.[108] Because values vary in importance, it is possible to characterize societies by the relative importance attributed to these values in the society using dimensional models. This yields unique cultural profiles for societies or countries.[109]

A pioneering and still influential dimensional framework for characterizing cultures was advanced by Geert Hofstede,[110] which is used today in studies on

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ple, resists hierarchy and centralized authority more than, say, French culture. German citizens are proud of their national codetermination. Italian family firm owners may get special utility from a longstanding family-controlled business, while an American family might prefer to cash the company earlier and run the family scion for the U.S. Senate.") (footnote omitted); Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 831 (1992) (arguing that non-regulatory constraints on American managers' opportunism include "cultural norms of behavior").

104. For detailed treatments of cultural aspects in corporate governance and securities regulation from a political economy perspective, see Curtis J. Milhaupt, *A Relational Theory of Japanese Corporate Governance: Contract, Culture, and the Rule of Law*, 37 HARV. INT'L L. J. 3 (1996); James A. Fanto, *The Absence of Cross-Cultural Communication: SEC Mandatory Disclosure and Foreign Corporate Governance*, 17 NW. J. INT'L L. & BUS. 119 (1996).

105. In addition to psychology, the disciplines that have been dealing with cultural comparisons include anthropology and political science. *See generally*, CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES: SELECTED ESSAYS (1973); MICHAEL THOMPSON, RICHARD ELLIS, & AARON WILDAVSKY, CULTURAL THEORY (1990); RONALD INGLEHART, MODERNIZATION AND POSTMODERNIZATION: CULTURAL, ECONOMIC AND POLITICAL CHANGE IN 43 SOCIETIES (1997).

106. The text only summarizes the core features of the two leading models in this field. For a general accessible introduction to cross-cultural psychology and additional sources, see Licht, *supra* note 76. For further details, see Shalom H. Schwartz, *Cultural Value Differences: Some Implications for Work*, 48 APPL'D PSYCHOL. INT'L REV. 23 (1999).

107. This definition is similar to that adopted in studies of the effects of societal development, for example, CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS (Lawrence E. Harrison & Samuel P. Huntington eds., 2000), and widespread in cross-cultural psychology, for example, HANDBOOK OF CROSS-CULTURAL PSYCHOLOGY (J.W. Berry, M.H. Segall & C. Kagitcibasi eds., 2nd ed. 1997).

108. *See, e.g.*, MILTON ROKEACH, THE NATURE OF HUMAN VALUES (1973); FLORENCE R. KLUCKHOHN & FRED L. STRODTBECK, VARIATIONS IN VALUE ORIENTATIONS (1961).

109. For details on the statistical tools used for producing dimensional profiles, see Licht, *supra* note 76, at 170-75.

110. *See* GEERT H. HOFSTEDE, CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES (1980) [hereinafter CULTURE'S CONSEQUENCES 1980]; GEERT HOFSTEDE,

management and accounting.[111] Hofstede ultimately identified five value dimensions:[112] Individualism/Collectivism, Power Distance, Uncertainty Avoidance, Masculinity/Femininity,[113] and Long-term Orientation.[114] Another important theory was developed mostly during the 1990s by Shalom Schwartz.[115] Schwartz defines three cultural value dimensions: Embeddedness/Autonomy, Hierarchy/Egalitarianism, and Mastery/Harmony. Tables 1 and 2, respectively, set forth the Hofstede and Schwartz value dimensions and the basic societal problems they address. Each dimension describes a range of possible societal stances between two polar extremes.

Based on their value priorities, countries can further be classified into cultural regions. Hofstede's analysis yielded the following regions: Anglo, Germanic, Nordic, two Latin regions, two Asian regions (one consisting only of Japan), and Near Eastern.[116] Six cultural groups of nations were identified by Schwartz: English-speaking, West European, East European, Far Eastern, Latin American, and African.[117] A broader, more recent sample suggests that the Far Eastern cultural region comprises two sub-regions: South Asian and Confucian.[118] The latter region consists of China, Hong Kong, Taiwan, South Korea, Singapore, and Japan—though Japan differs some from the others.

CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS (2d ed. 2001) [hereinafter CULTURE'S CONSEQUENCES]; GEERT H. HOFSTEDE, CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND (1991) [hereinafter SOFTWARE OF THE MIND].

111. *See* Peter B. Smith, *The End of the Beginning?*, 1 INT'L J. CROSS-CULTURAL MGMT. 21 (2001). *See also* STEPHEN P. ROBBINS & MARY COULTER, MANAGEMENT 125-29 (6th ed. 1999) (arguing that "[t]he most valuable framework to help managers better understand differences between national cultures was developed by Geert Hofstede."); RICHARD MEAD, INTERNATIONAL MANAGEMENT: CROSS-CULTURAL DIMENSIONS (2nd ed. 1998) (drawing on Hofstede's theory); Graeme L. Harrison & Jill L. McKinnon, *Cross-Cultural Research in Management Control System Design: A Review of the Current State*, 24 ACCT. ORG. & SOC. 483 (1999) (same). Hofstede's work has also stirred objections on various grounds over the years. For a review and discussion of common objections, see HOFSTEDE, CULTURE'S CONSEQUENCES, *supra* note 110, at 73.

112. The names of value dimensions are capitalized throughout to notify that these are terms of art whose definitional meaning might differ from the common usage of these words.

113. This label has elicited negative responses. Writing originally in 1980, Hofstede was well aware of the problems of attributing certain qualities to particular genders. He nonetheless kept this dimension, arguing that it reflects a positive reality that is independent of its normative undesirability. HOFSTEDE, CULTURE'S CONSEQUENCES 1980, *supra* note 110, at 189-90. In the 2001 edition, Hofstede follows the modern distinction between *sex* and *gender* and uses the latter term when referring to social function. HOFSTEDE, CULTURE'S CONSEQUENCES, *supra* note 110, at 280. For further discussions, see GEERT H. HOFSTEDE & WILLEM A. ARRINDELL, MASCULINITY AND FEMININITY: THE TABOO DIMENSION OF NATIONAL CULTURES (1998).

114. This value dimension was not included in Hofstede's original study. It was added later, in HOFSTEDE, Software of the Mind, *supra* note 110, in light of a study led by Michael Bond. There, it was named "Confucian work dynamism." *See* The Chinese Cultural Connection, *Chinese Values and the Search for Culture-Free Dimensions of Culture*, 18 J. CROSS-CULTURAL PSYCHOL. 143 (1987). Notwithstanding its apparent link to Asian cultures, data for this dimension cover a smaller set of countries and it is not commonly used in the literature.

115. *See* Schwartz, *supra* note 106

116. HOFSTEDE, CULTURE'S CONSEQUENCES 1980, *supra* note 110, at 333-36. Note that the classification into more and less economically developed cultural regions dates from 1980.

117. Schwartz, *supra* note 106, at 35-39.

118. Shalom H. Schwartz, Relations of Culture to Social Structure, Demography and Policy in the Study of Nations, Invited Lecture Delivered at the 25th International Congress of Applied Psychology, Singapore, July 2002 (on file with author).

TABLE 1. THE HOFSTEDE VALUE DIMENSIONS

Individualism/Collectivism	Valuing loosely knit social relations in which individuals are expected to care only for themselves and their immediate families versus tightly knit relations in which they can expect their wider in-group (e.g., extended family, clan) to look after them in exchange for unquestioning loyalty.
Power Distance	Accepting an unequal distribution of power in institutions as legitimate or illegitimate.
Uncertainty Avoidance	Feeling uncomfortable or comfortable with uncertainty and ambiguity and therefore valuing or devaluing beliefs and institutions that provide certainty and conformity.
Masculinity/Femininity	Valuing achievement, heroism, assertiveness, and material success versus relationships, modesty, caring for the weak, and interpersonal harmony.
Long-Term Orientation	Having a long-term time orientation; emphasizing Confucian work ethics such as thrift and persistence.

TABLE 2. THE SCHWARTZ VALUE DIMENSIONS

Embeddedness/Autonomy	This dimension concerns the desirable relationship between the individual and the group. Embeddedness represents a cultural emphasis on maintenance of the status quo, propriety, and restraint of actions or inclinations that might disrupt the solidary group or the traditional order. Autonomy describes cultures in which the person is viewed as an autonomous, bounded entity who finds meaning in his or her own uniqueness.
Hierarchy/Egalitarianism	This dimension concerns guaranteeing responsible behavior that will preserve the social fabric. Hierarchy refers to a cultural emphasis on obeying role obligations within a legitimately unequal distribution of power, roles, and resources. Egalitarianism refers to an emphasis on transcendence of selfish interests in favor of voluntary commitment to promoting the welfare of others.
Mastery/Harmony	This dimension concerns the relation of humankind to the natural and social world. Mastery refers to a cultural emphasis on getting ahead through active self-assertion whereas Harmony refers to an emphasis on fitting harmoniously into the environment.

These theories and data make it possible to make systematic observations about Korea's culture. In Hofstede's regional classification, Korea is part of the Asian region. Its scores on Hofstede's dimensions reflect societal preferences for high Collectivism, high Uncertainty Avoidance, moderately high Power Distance, moderate Masculinity, and high Long-term Orientation.[119] In the

119. HOFSTEDE, CULTURE'S CONSEQUENCES, *supra* note 110, at 500. Hofstede's scores are based on surveys that were conducted in the late 1960s and early 1970s. Since that time, Korea has experienced massive changes in its economic and political conditions—a fact that could affect its cultural values. Jong-Seo Choi provides a knowledgeable discussion of this issue and argues that Koreans have become more individualist and less uncertainty avoiding. This is a plausible assertion.

Schwartz data, Korea's scores reflect societal preferences for Embeddedness over Autonomy, for Hierarchy over Egalitarianism, and for Mastery over Harmony. This profile is consonant with many analyses of Confucian culture.[120] Overall, the cultural profiles under the two dimensional theories are congruent with one another. Hence, the nature of Korea's culture as Confucian, autocratic, and collectivist, or embedded, has concrete empirical support.[121]

3. *Cognitive Styles*

For several decades, most psychologists have assumed that basic cognitive processes are universal: Every human being is equipped with the same set of attentional, memorial, learning, and inferential procedures.[122] Cognitive scientists' endorsement of the universalistic position was encouraged by the analogy between the human mind and the computer: brain equals hardware, cognitive procedures equals operating principles and factory-installed software.[123] The heuristics and biases movement started by Kahneman and Tversky encouraged the view that procedures such as judgment of probability by the representativeness heuristic and judgment of frequency by the availability heuristic, were primary, universal, and difficult to alter.[124]

Evidence since the late 1990s now casts doubt on the universality assumption about cognitive processes. Studies indicate that cognitive styles differ markedly across cultures. People from different cultures perceive, understand, and judge the world in systematically different ways. Cultural differences in cognitive processes are further tied to cultural differences in basic assumptions about the nature of the world. Finally, cultural practices encourage and sustain certain kinds of cognitive processes, which then perpetuate the cultural practices.[125]

However, Choi's detailed description of contemporary prevailing values actually confirms Korea's profile as a society that is still high on Collectivism and Uncertainty Avoidance. Choi's conclusions about Korea's accounting system are consistent with this view. *See* JONG-SEO CHOI, FINANCIAL CRISIS AND ACCOUNTING REFORM: A CULTURAL PERSPECTIVE (Working Paper 2001). *See infra* note 176.

120. HOFSTEDE, CULTURE'S CONSEQUENCES, *supra* note 110.

121. *See supra* note 100.

122. This is only one basic assumption. The literature on culture and cognition is outpouring. *See* Richard E. Nisbett & Ara Norenzayan, *Culture and Cognition*, *in* STEVENS' HANDBOOK OF EXPERIMENTAL PSYCHOLOGY: COGNITION 561 (D. L. Medin ed., 3rd ed. 2001); Richard E. Nisbett et al., *Cultures as Systems of Thought: Holistic versus Analytic Cognition*, 108 PSYCHOL. REV. 291 (2001); Kaiping Peng, Daniel R. Ames & Eric Knowles, *Culture and Human Inference*, in HANDBOOK OF CULTURE AND PSYCHOLOGY 245 (D. Matsumoto ed., 2001); Alan P. Fiske et al., *The Cultural Matrix of Social Psychology*, *in* HANDBOOK OF SOCIAL PSYCHOLOGY 915 (D. T. Gilbert, S. T. Fiske & G. Lindzey eds., 4th ed. 1998).

123. Nisbett & Norenzayan, *supra* note 122, at 561 (citing N. Block, *The Mind as the Software of the Brain*, *in* THINKING: AN INVITATION TO THE COGNITIVE SCIENCE 377 (E. E. Smith & D. N. Osherson eds. 1995)). Note, anecdotally, that Hofstede considered culture to be the software of the mind. HOFSTEDE, SOFTWARE OF THE MIND, *supra* note 110.

124. Nisbett & Norenzayan, *supra* note 122, at 561. For a law-oriented discussion, see Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998). *See also* Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

125. Nisbett & Norenzayan, *supra* note 122, at 561-62.

The vast majority of empirical studies compared Western (mostly American) subjects with East Asian (mostly Chinese and Korean) subjects. For instance, Americans were more inclined to assign causality and responsibility to individual group members in agency situations, while the Chinese were more inclined to assign them to attributes of the group as a whole.[126] In explaining causes of behavior, Koreans, more so than Americans, placed credence on situational and interactional factors.[127] Koreans were also better able than Americans to recognize the influence of situational constraints on individual behavior: Americans were more susceptible to the fundamental attribution error.[128] On the other hand, Koreans were more susceptible to the hindsight bias, believing that they could have predicted outcomes that in fact one could not have predicted.[129] This finding may stem from the fact that in analyzing a situation, Koreans consider more factors as relevant than Americans do.[130]

To conceptualize the differences between subjects' cultures, researchers draw on the distinction between conceptions of the self as independent versus interdependent, as suggested by Markus and Kitayama.[131] In this view, the Western construal of the self is characterized by a sense of autonomy and distinctiveness from others. In the East Asian construal of the self, one's identity is diffused socially across significant others in one's in-group.[132] These polar views resemble Schwartz's Autonomy/Embeddedness dimension and are also reminiscent of, but not identical to, Hofstede's and Triandis's Individualism/Collectivism distinction.[133] Explanations for these, and many other striking cultural differences in cognitive styles call upon differences in reasoning traditions with ancient roots—possibly traced to the era of Confucius and Aristotle.[134]

4. Measuring Cultural Distance

To examine some empirical evidence of the implications of cultural differences on corporate governance, it is useful to explore the concept of cultural distance. Conceptually, the cultural distance between nations represents "the sum of factors creating, on the one hand, a need for knowledge, and on the other

126. Tanya Menon et al., *Culture and the Construal of Agency: Attribution to Individual Versus Group Dispositions*, 76 J. PERSONALITY & SOC'L PSYCHOL. 701 (1999).

127. Ara Norenzayan, Incheol Choi & Richard E. Nisbett, *Cultural Similarities and Differences in Social Inference: Evidence from Behavioral Predictions and Lay Theories of Behavior*, 28 PERSONALITY & SOC'L PSYCHOL. BUL. 109 (2002).

128. Incheol Choi & Richard E. Nisbett, *Situational Salience and Cultural Difference in the Correspondence Bias and Actor-Observer Bias*, 24 PERSONALITY & SOC'L PSYCHOL. BUL. 949 (1998).

129. Incheol Choi & Richard E. Nisbett, *The Cultural Psychology of Surprise: Holistic Theories and Recognition of Contradiction*, 79 J. PERSONALITY & SOC'L PSYCHOL. 890 (2000).

130. Nisbett & Norenzayan, *supra* note 122, at 585 (citing INCHEOL CHOI, R. DALAL & C. KIM-PRIETO, INFORMATION SEARCH IN CAUSAL ATTRIBUTION: ANALYTIC VS. HOLISTIC (University of Illinois, Working Paper, 2000)).

131. Hazel R. Markus & Shinobu Kitayama, *Culture and the Self: Implication for Cognition, Emotion, and Motivation*, 98 PSYCHOL. REV. 224 (1991).

132. Peng et al., *supra* note 122, at 248.

133. *See* HARRY C. TRIANDIS, INDIVIDUALISM AND COLLECTIVISM (1995).

134. *See* Fiske et al., *supra* note 122, at 322-24.

hand, barriers to knowledge flow and hence also for other flows between the home and the target countries."[135] The discussion thus far has shown that the notion of countries' cultures differing goes beyond lay intuitions and can be analyzed systematically. By extracting the most fundamental differences among cultures and operationalizing them in numerical data, the cultural value dimension framework then allows for the generation of testable hypotheses and further empirical investigation through cross-sectional samples. The legal and economic literature has not yet taken advantage of this powerful tool.[136] However, as noted above, international business scholars rely extensively on Hofstede's theory and data. Based on this framework, this line of scholarship has also developed a numerical measure for cultural distance.

To understand the operationalization of cultural distance, consider nations' scores on each of the cultural value dimensions as coordinates on a grid or in a space. Hofstede's original framework thus defines a four-dimensional space. Cultural distance between two particular countries in this context would consist of some weighted average of the differences between these countries' scores on the four dimensions. A seminal study by Kogut and Singh investigated American corporations' mode of entry into business in foreign countries and specifically the hypothesis that differences in cultures among countries influence the perception of managers regarding the costs and uncertainty of alternative modes of entry.[137] To test this proposition empirically, Kogut and Singh developed a composite index of cultural distance based on the deviation along Hofstede's dimensions. The index consisted of the average of the square difference between the scores of the United States and the other country on each dimension, weighted by the variance of this dimension. Subsequent studies have used Kogut and Singh's measure, sometimes with adaptations or simplifications.[138]

The relationship between cultural distance and mode of entry into business in foreign countries is the subject of a large research literature but has not yet been fully discerned.[139] Some scholars have found that cultural distance correlated positively with high levels of home control in the entry mode (wholly owned subsidiaries).[140] Others relate higher levels of cultural distance to shared

135. Harry Barkema et al., *Working Abroad, Working with Others: How Firms Learn to Operate International Joint Ventures*, 40 ACAD. MGMT. J. 426, 427 (1997).

136. *But see infra* note 179 for current efforts in this direction.

137. Bruce Kogut & Harry Singh, *The Effect of National Culture on the Choice of Entry Mode*, 19 J. INT'L BUS. STUD. 411, 413-14 (1988).

138. *See, e.g.*, Sanjeev Agarwal, *Socio-Cultural Distance and the Choice of Joint Ventures: A Contingency Perspective*, 2 J. INT'L MARKETING 63 (1994); Harry Barkema, John Bell & Johannes Pennings, *Foreign Entry, Cultural Barriers, and Learning*, 17 STRATEGIC MGMT. J. 151 (1996); Piero Morosini, Scott Shane & Harbir Singh, *National Cultural Distance and Crossborder Acquisition Performance*, 29 J. INT'L BUS. STUD. 137 (1998); Richard Fletcher & Jenifer Bohn, *The Impact of Psychic Distance on the Internationalisation of the Australian Firm*, 12 J. GLOBAL MARKETING 47 (1998).

139. For a survey, see ARJEN SLANGEN & JEAN-FRANOIS HENNART, CULTURAL DISTANCE AND FOREIGN DIRECT INVESTMENT: A COMPREHENSIVE MODEL EXPLAINING THE IMPACT OF NATIONAL CULTURAL DIFFERENCES ON ENTRY MODE CHOICE AND SUBSIDIARY PERFORMANCE (Working Paper, 2002).

140. *See, e.g.*, Jaideep Anand & Andrew Delios, *Location Specificity and the Transferability of Downstream Assets to Foreign Subsidiaries*, 28 J. INT'L BUS. STUD. 579 (1997); Prasad

control modes of entry (joint ventures).[141] The exact answer may be contingent on the interaction between cultural distance and some additional factors.[142] For the present discussion, determining the answer to this question is unnecessary. To be gleaned from this lively debate is the possibility of analyzing complex and nebulous social concepts like "cultural distance" in a fully rigorous fashion.

C. *Implications*

The above review suggests several insights gained by recent research that are directly relevant to corporate governance. The fundamental problem of corporate governance—namely, the agency problem faced by various corporate constituencies—stems from moral hazard situations, created by informational asymmetries between investors and their agents.[143] Corporate governance systems utilize both legal measures and shareholding structures to mitigate these asymmetries and reduce their adverse effects. But because informational asymmetries cannot be fully eliminated, neither can the agency problem be fully resolved. When investors and corporate agents come from different cultures, the cultural distance between them may exacerbate informational asymmetries and erode the effectiveness of governance mechanisms.

The general hypothesis implied by the above-mentioned research is that basic concepts of corporate governance—including accountability, self-dealing, and fair and equitable treatment—would be related to certain value emphases and cognitive styles. These concepts probably connote fundamentally different things to Americans than to Koreans.

As a case in point, consider the independent director. Codes of corporate governance principles strongly recommend that at least a substantial number, if not a majority, of board members in public corporations should be independent.[144] These codes, as well as stock exchanges' listing rules, require that sensitive board committees (for instance, remuneration committees) be dominated by independent directors.[145] The exact definition of "independent" varies, but

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Padmanabhan & Kang Rae Cho, *Ownership Strategy for a Foreign Affiliate: An Empirical Investigation of Japanese Firms*, 36 MGMT. INT'L REV. 45 (1996).

141. *See, e.g.*, Kogut & Singh, *supra* note 137; M. Krishna Erramilli & C.P. Rao, *Service Firms' International Entry-Mode Choice: A Modified Transaction-Cost Analysis Approach*, 57 J. MARKETING 19 (1993).

142. *See* Keith Brouthers & Lance Brouthers, *Explaining the National Cultural Distance Paradox*, 32 J. INT'L BUS. STUD. 177 (2001) (finding evidence for an interaction between cultural distance and investment risk).

143. *See generally* Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737 (1997).

144. For a comprehensive list of such codes and downloadable texts see the European Corporate Governance Institute's website, *at* http://www.ecgi.org/codes/index.htm.

145. In the wake of the Sarbanes-Oxley Act of 2002, the major national U.S. stock exchanges in early 2003 proposed listing rules that would greatly increase the role of independent directors. Thus, the NYSE proposed that (1) A majority of the company's board of directors must be independent; (2) The definition of "independent director" will be tightened; (3) The Nominating or Corporate Governance committee and the Compensation committee must be made up entirely of independent directors. *See* THE BANK OF NEW YORK, NEW CORPORATE GOVERNANCE STANDARDS FOR U.S. ISSUERS (2003), *available at* http://www.adrbny.com/dr_cgm_NYSE_NASDAQ.jsp.

the ideal type of the independent director is a person who is unrelated to the company's insiders with regard to family or business ties, who will insist on transparency and accountability from senior managers, and who is capable of openly challenging the chairperson and other members of the board. Moreover, if necessary, an independent director will be willing to bring a derivative action if the interest of the company and its public shareholders requires such action.[146]

Can Koreans fulfill the role of independent directors as effectively as Americans, or in line with American expectations? The line of research surveyed above suggests a negative answer. A set of studies by Kim and Markus examined how values of uniqueness or conformity are manifest in mundane actions that are common in everyday life and found cultural divergence in values, beliefs, and affect. Americans preferred uniqueness, while Koreans and other East Asians preferred conformity.[147] These results show that the negative connotation of conformity among Americans is a cultural construct. In East Asia, where conformity is the norm, standing out and speaking one's mind—which are cherished qualities in the United States, and are particularly sought for in outside directors—are not viewed positively.

Menon et al. compared explanations for "rogue trader" scandals in leading newspapers from a Confucian-influenced East Asian country (Japan) and from the United States.[148] All cases involved multimillion dollar losses occurring in banks during the same 5-year period of 1991-1996 and incurred in connection with a mid-level manager's behavior. However, because neither the individual nor the organization fully controlled the other, blame was not definitively placed in either. The results showed that American accounts of all scandals emphasized the individual rather than the group more so than did the Asian accounts.[149] In other words, while the accountability of the individual was "evident" to American observers, mitigating structural factors were not, and vice versa for the Asian commentators.

Finally, Korean views as to who may be regarded as an unrelated—and, therefore, independent—person vary greatly from American views. Koreans regard those who share the same great-great-grandfather as their relatives. As previously noted, the most common unit of bloodline-based social network is the clan, whose members identify with a shared ancestor who lived hundreds or even a thousand years ago. "Nevertheless," Han and Choe maintain, "awareness of belonging to the same clan seems enough to change interactional patterns."[150]

146. *See* Luca Enriques, *Bad Apples, Bad Oranges: A Comment from Old Europe on Post-Enron Corporate Governance Reforms*, 38 WAKE FOREST L. REV. 911 (2003) (providing a critical analysis of the necessary qualities expected from independent directors).

147. Heejung Kim & Hazel Rose Markus, *Deviance or Uniqueness, Harmony or Conformity? A Cultural Analysis*, 77 J. PERSONALITY & SOC. PSYCHOL. 785 (1999).

148. Menon et al., *supra* note 126, at 708-10.

149. *Id.* at 707; *see also* Michael W. Morris & Kaiping Peng, *Culture and Cause: American and Chinese Attributions for Social and Physical Events*, 67 J. PERSONALITY & SOC. PSYCHOL. 949 (1994).

150. Gyuseog Han & Sug-Man Choe, *Effects of Family, Region, and School Network on Interpersonal Intentions and the Analysis of Network Activities in Korea*, *in* INDIVIDUALISM AND COLLECTIVISM: THEORY, METHOD, AND APPLICATIONS 213, 214 (Uichol Kim et al. eds., 1994).

Other significant network-based identities for Koreans include regional groupings composed of people from the same hometown and school networks composed of alumni. Networks are effective in facilitating interpersonal interactions; the more networks both interactants share, the more smoothly the interaction proceeds.[151]

These studies suggest caution in pursuing a vigorous policy of staffing Korean boards with independent directors. A truly independent director may be considered an outsider rather than an outside director. Even if perceived as an integral part of the group of board members (and to the extent that this is so), it would be difficult for her to identify the complex cases and to ask the hard questions. This is not to say that independent directors would be worthless in Korea. There is some evidence that outside directors are associated with higher values of Korean public companies.[152] Yet the trend toward giving independent directors greater pride of place is somewhat puzzling. Empirical studies in the United States thus far have not shown any significant contribution of higher board independence to corporate performance.[153] The general and particular propositions stated above clearly are worthy of further investigation.

The remainder of this section discusses additional aspects of corporate governance about which cultures may differ. The focus is on the actual content of different cultural emphases more than on the degree of difference (that is, the cultural distance). Studies that find a significant contribution of cultural factors in their data (in regression analyses) effectively imply that the cultural distance was large enough to produce a noticeable variance in the observed data. Whenever cultural differences are mentioned as an obstacle to regulatory reforms one should infer that cultural distance might be involved. Concrete empirical investigation that relies explicitly on cultural distance variables is clearly warranted.[154] The following section returns to this factor and connects it to informational distance in cross-listed securities.

1. Accounting Standards and Practices

Cross-listing studies employing various methodologies invariably indicate a potent factor in the decision to list on a foreign market is the disclosure regime that would govern the issuer in the destination market. At the heart of these disclosure regimes are the accounting principles under which issuers prepare their financial statements. These statements are public corporations' principal means of communication with their shareholders. As such, accounting disclo-

151. *Id.* at 218.

152. *See* BERNARD S. BLACK, HASUNG JANG & WOOCHAN KIM, DOES CORPORATE GOVERNANCE AFFECT FIRM VALUE? EVIDENCE FROM KOREA (Stanford Law and Economics, Olin Working Paper No. 237, 2003).

153. BENJAMIN E. HERMALIN & MICHAEL S. WEISBACH, BOARDS OF DIRECTORS AS AN ENDOGENOUSLY DETERMINED INSTITUTION (NBER, Working Paper No. 8161, 2001); Sanjai Bhagat & Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 BUS. LAW 921 (1999).

154. With regard to the United States and Korea one may assume that the cultural distance between them is significant, at least along the Individualism/Collectivism or Autonomy/Embeddedness dimensions.

sures are an important corporate governance tool.[155] A sophisticated accounting profession with the skill to discover undisclosed self-dealing transactions and insist on proper disclosure is among the core institutions required for successful securities markets to develop.[156] The findings by recent migration studies of cross-listing clustering into cultural regions and of cultural proximity affecting cross-border trading[157] suggest that cultural differences may contribute to what Portes and Rey call "informational frictions." These findings beg the question whether national accounting standards reflect cultural features. Not surprisingly, the answer is that they do—or, more accurately, that they did.

Accounting is a social activity. It rests on continual judgments and decision making. In certain cases, accounting may involve ethical issues (especially in auditing activities). International accounting scholars agree that culture is a major factor among those that affect national accounting systems, including rules, practices, and institutions.[158] Drawing on Hofstede's value dimensions, a seminal work by Sidney Grey set forth possible connections between national culture and accounting systems.[159] For example, Grey hypothesized that a preference for secrecy in accounting would correlate with strong Uncertainty Avoidance, high Power Distance, Collectivism, and Long-term Orientation.[160] Salter and Niswander found that Grey's theory is best at explaining actual financial reporting practices and that the prominent explanatory variable was Uncertainty Avoidance. Controlling for the development of financial markets and levels of taxation enhanced the strength of the findings.[161] Negative relations between Uncertainty Avoidance scores and levels of disclosure were found in a number of other studies.[162] Evidence further indicates that withholding information

155. *See* Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335, 1346 (1996); Merritt B. Fox, *Required Disclosure and Corporate Governance*, *in* COMPARATIVE CORPORATE GOVERNANCE: THE STATE OF THE ART AND EMERGING RESEARCH 701 (Klaus J. Hopt et al. eds., 1998).

156. *See* Black, *supra* note 9, at 809.

157. *See* Pagano et al., *supra* note 42; Sarkissian & Schill, *supra* note 44; PORTES & REY, *supra* note 48.

158. *See* Helen Gernon and R.S. Olusegun Wallace, *International Accounting Research: A Review of its Ecology, Contending Theories, and Methodologies*, 14 J. ACCT. LIT. 54 (1995); Harry H.E. Fechner & Alan Kilgore, *The Influence of Cultural Factors on Accounting Practice*, 29 INT'L J. ACCT. 265 (1994); GERHARD G. MUELLER, HELEN GERNON & GARY K. MEEK, ACCOUNTING: AN INTERNATIONAL PERSPECTIVE 10-11 (4th ed. 1997).

159. Sidney J. Gray, *Towards a Theory of Cultural Influence on the Development of Accounting Systems Internationally*, 24 ABACUS 1 (1988). For a similar model, see Hector M. Perera, *Towards a Framework to Analyze the Impact of Culture on Accounting*, 24 INT'L J. ACCT. 42 (1989). *See also* Graeme L. Harrison & Jill L. McKinnon, *Culture and Accounting Change: A New Perspective on Corporate Reporting Regulation and Accounting Policy Formulation*, 11 ACCT. ORG. & SOC'Y 233 (1986). For a review of earlier efforts, see SHRADDHA VERMA, CULTURE AND POLITICS IN INTERNATIONAL ACCOUNTING: AN EXPLORATORY FRAMEWORK (Working Paper, 2000).

160. Gray, *supra* note 159, at 8-11.

161. Stephen B. Salter & Frederick Niswander, *Cultural Influence on the Development of Accounting Systems Internationally: A Test of Gray's [1988] Theory*, 26 J. INT'L BUS. STUD. 379 (1995).

162. *See* Michele L. Wingate, *An Examination of Cultural Influence on Audit Environment*, 11 RES. ACCT. REG. 115 (1997); Sidney J. Gray & Hazel M. Vint, *The Impact of Culture on Accounting Disclosures: Some International Evidence*, 2 ASIA-PAC. J. ACCT. 33 (1995); Timothy S. Doupnik &

from investors in high Uncertainty Avoidance countries benefits companies through lower litigation.[163]

The intensifying cross-listing trend during the 1990s has underscored the fact that international diversity in accounting systems has imposed heavy transaction costs on issuers who have wanted to tap foreign markets, due to the need to prepare a different set of financial statements according to each market's accounting regime. It has been shown, however, that the reconciliation of accounting data to U.S. generally accepted accounting principles (GAAP) required under Form 20-F was value-relevant.[164] For over a decade, U.S. GAAP were thus praised by SEC officials as a central component of the greater investor protection provided by American stock markets. Yet, these principles were also blamed by NYSE officials for deterring potential issuers from bringing more business to U.S. stock exchanges.[165] During the late 1990s, the SEC clashed with the International Accounting Standards Committee (IASC) over the ultimate content and stringency of the International Accounting Standards (IAS) that the IASC was developing. The confrontational interaction with the IASC intended to ensure that the U.S. markets were not put at a competitive disadvantage vis-à-vis non-U.S. markets.[166]

The resulting set of thirty core IASs eventually produced by IASC and endorsed by the International Organization of Securities Commissions (IOSCO)[167]—though not yet by the SEC—is said to be very close to U.S. GAAP.[168] The world is nearing a point in which the larger part of disclosure regulation will not exhibit cross-national diversity, as comparability of financial statements will be ensured.[169]

Stephen B. Salter, *External Environment, Culture, and Accounting Practice: A Preliminary Test of a General Model of International Accounting Development*, 30 INT'L J. ACCT. 189 (1995).

163. *See* Wingate, *supra* note 161.

164. *See* Eli Amir, Trevor S. Harris & Elizabeth K. Venuti, *A Comparison of the Value-Relevance of U.S. versus Non-U.S. GAAP Accounting Measures Using Form 20-F Reconciliations*, 31 J. ACCT. RES. 230 (1993).

165. *See, e.g.*, Richard C. Breeden, *Foreign Companies and U.S. Securities Markets in a Time of Economic Transformation*, 17 FORDHAM INT'L L. J. 77 (1994); James L. Cochrane, *Are U.S. Regulatory Requirements for Foreign Firms Appropriate?*, 17 FORDHAM INT'L L. J. S58 (1994); *see also* Carol A. Frost & Mark H. Lang, *Foreign Companies and U.S. Securities Markets: Financial Reporting Policy Issues and Suggestions for Research*, 10 ACCT. HORIZONS 95 (1996) (reporting that that the SEC's financial reporting requirements may deter foreign firms from offering their securities on U.S. markets); William J. Baumol & Burton G. Malkiel, *Redundant Regulation of Foreign Security Trading and U.S. Competitiveness*, *in* MODERNIZING U.S. SECURITIES REGULATION 39 (Keneth Lehn & Robert Kamphius eds., 1992).

166. *See* Amir N. Licht, *Games Commissions Play: 2x2 Games of International Securities Regulation*, 24 YALE J. INT'L L. 61 (1999).

167. IOSCO, IASC STANDARDS – ASSESSMENT REPORT (2000).

168. *See* Donna L. Street et al., *Assessing the Acceptability of International Accounting Standards in the US: An Empirical Study of the Materiality of US GAAP Reconciliations by Non-US Companies Complying with IASC Standards*, 35 INT'L J. ACCT. 27 (2000) (finding narrowing differences between U.S. GAAP and IAS and suggesting that the SEC should consider accepting IAS standards without condition).

169. As regards the bonding-or-avoiding question, competition among stock markets may not any more revolve around disclosure regulation. In theory, this would pronounce the end of the piggybacking race as it would render the bonding (and the avoiding) rationale redundant. Competi-

Empirical research shows that the imprint of national cultures on accounting systems still looms, however. As the trend of accounting standard harmonization gains momentum, culturally-related differences that in the 1990s were discernable in formal accounting rules have become less visible. The adoption of the IAS surely increases the amount of information available to public investors[170] and it can therefore mitigate moral hazard in issuers who seek a foreign listing. If regulators require IAS-based disclosure from domestic issuers as well, then differences among national regimes would further diminish. Yet even disclosures that comply with IAS are prepared by professionals in the issuer's home country. To the extent that the issuer's home country traditionally did not require the fullest disclosure, the problem becomes one of enforcing the new rules rather than requiring disclosure.

A study of accounting disclosures by issuers who complied with IAS shows that *de facto* compliance with IAS is greater for issuers with U.S. listings or filings. This highlights the significance of enforcement of any disclosure regime that would govern issuers.[171] The accounting professionals entrusted with this task are the auditors. But formal harmonization reforms may have little impact on auditing practices. Thus, differences in auditing practices were found between British auditors and German ones, notwithstanding a European Union Directive that established the "true and fair view" as a general auditing standard.[172]

Arnold et al. recently examined differences in materiality estimates among experienced senior auditors in the (then) big-six accounting firms in Europe. Subjects were asked to estimate the materiality of discrepancies in financial statements of a client whose integrity was rated as high or low.[173] Although there are conventions and formal guidelines for auditors governing materiality thresholds, significant differences were found among auditors in their materiality judgments. Uncertainty Avoidance emerged as the most powerful explanatory variable for these differences; in high Uncertainty Avoidance societies, auditors might expand the limits of the materiality estimates so that remaining errors are not deemed material.[174]

The materiality of informational items is perhaps the single most important issue in securities regulation. Materiality is the yardstick with which the scope

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tion would focus on liquidity, clearance and settlement, and similar issues of little concern to lawyers. Such a conclusion would be premature, however, as shown in the text.

170. *But see* Norlin G. Rueschhoff & C. David Strupeck, *Equity Returns: Local GAAP versus U.S. GAAP For Foreign Issuers From Developing Countries*, 33 J. INT'L ACCT. 377 (1998) (differences in accounting principles cause extreme variations in reported net income, stockholders' equity, and equity returns for some developing countries, notwithstanding reconciliation with U.S. GAAP).

171. *See* Donna L. Street & Stephanie M. Bryant, *Disclosure Level and Compliance with IASs: A Comparison of Companies With and Without U.S. Listings and Filings*, 35 INT'L J. ACCT. 305 (2000).

172. *See* Carol A. Frost & Kurt P. Ramin, *International Auditing Differences*, 181 J. ACT'Y. 62 (1996).

173. *See* Donald F. Arnold Sr., Richard A. Bernardi & Presha E. Neidermeyer, *The Association Between European Materiality Estimates and Client Integrity, National Culture, and Litigation*, 36 INT'L J. ACCT. 459 (2001).

174. *Id.* at 472-76.

of required disclosure is determined and hence the test under which cases of misrepresentation, fraud, and insider trading are decided.[175] Arnold et al.'s study implies that at the most sensitive junctions of judgment on corporate disclosure, the people in charge of guaranteeing the quality of disclosure are affected by their cultural values. No matter how harmonized (or reconciled) the disclosures of a cross-listed foreign issuer are as a matter of form, these disclosures will differ systematically from a similar disclosure of a domestic issuer. Note that Arnold et al.'s subjects were top-of-the-line auditors, working in local branches of American firms under highly uniform standards. It is plausible to assume that the disclosures of issuers who use purely local accounting professionals or are located in non-Western countries will exhibit even stronger cultural biases.

In the case of Korea, several reforms mandated by the IMF related to accounting issues to improve public shareholders' protection. These reforms included convergence toward the IAS, preparation of special combined statements for the *chaebols*, and nomination of external auditors in listed firms. Jong-Seo Choi provides a piercing account of Korea's accounting system as one that prefers secrecy and favors *chaebols'* owner-managers—consistent with Korea's cultural profile of a Confucian country.[176] Regarding the degree to which the reforms might have changed this system, Choi correctly observes that cultures exhibit high resilience to change but that external shocks could induce change. Yet the 1997 crisis apparently has not been a shock of sufficient magnitude, as most of these numerous reforms remain on paper. They have had little impact on actual practice, in accounting as well as in corporate governance. Summarizing this view, Choi concludes,

> [D]espite accounting systems changes after the 1997 financial crisis in Korea, the accounting cultural environment still remains qualitatively not very much different from what it used to be before the crisis . . . . [T]he motives for favoring accounting flexibility and secrecy still remain alive despite all the institutional efforts to enhance transparency and uniformity.[177]

2. *Legal Rules and Infrastructure*

As compared with the treatment of cultural influences in accounting research, legal literature on corporate governance lags far behind. Drawing on

175. *See, e.g.*, JAMES D. COX, ROBERT W. HILLMAN & DONALD C. LANGEVOORT, SECURITIES REGULATION: CASES AND MATERIALS 39-40 (3rd ed. 2001); LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 473 (3rd ed. 1995). For the SEC's position, see SECURITIES AND EXCHANGE COMMISSION, MATERIALITY, Staff Accounting Bulletin SAB No. 99 (1999), *available at* http://www.sec.gov/interps/account/sab99.htm.

176. CHOI, *supra* note 119, at 10-11; *see also* YOUNGOK KIM, DETERMINANTS OF FINANCIAL REPORTING SYSTEM: THE CASE OF SOUTH KOREA (Working Paper, 2001) (arguing that the "deep-rooted Confucian values have significantly affected Korea's economic and financial reporting system").

177. CHOI, *supra* note 119, at 25. Choi further reports the results of a survey of practicing Korean accountants that confirm this conclusion. A vast majority of the respondents confirmed that accounting conventions of secrecy and flexibility ("window dressing") have not changed and that auditor independence was lacking (citing Jong-Seo Choi, *Evaluating the Accounting Reforms in Korea After the 1997 Economic Crisis*, 1 J. KOREAN ECON. 1 (2001)).

different disciplines, some works have included calls for considering cultural aspects.[178] Finance scholars are also starting to show interest in investigating these issues.[179] A recent collaborative study with my colleagues Goldschmidt and Schwartz finds that La Porta et al.'s indices of investor protection correlate with cultural orientations toward low Harmony and low Uncertainty Avoidance, possibly in relation with countries' heritage of British rule.[180] Similar correlations are found for measures of formalism in civil litigation rules.[181] These findings are consistent with the view that nations vary in their inclination toward reconciling conflicting economic interests through volatile, confrontational litigation.[182]

In a separate study,[183] we found that levels of perceived legality (rule of law), non-corruption, and democratic accountability strongly and systematically correlate with higher Individualism and lower Power Distance in Hofstede's model. Better governance norms also correlate with higher Autonomy and Egalitarianism in Schwartz's model. These are the cultural values that Confucian countries tend to *de*-emphasize. In a regional comparison, Far Eastern countries on average score significantly lower on all measures of governance relative to English-speaking and West European countries.[184]

The societal emphases reflected in these findings are compatible with diametrical views about the rule of law as a desirable basis of social order that were expounded generations ago by Socrates and Confucius.[185] At least in countries with a strong Confucian heritage, the cultural infrastructure calls on people to seek guidance for conducting their personal life and social interactions in

178. *See* Milhaupt, *supra* note 105 (political economy); Fanto, *supra* note 104 (political economy); Licht, *supra* note 76 (cross-cultural psychology). *See generally* Douglas M. Branson, *The Very Uncertain Prospect of 'Global' Convergence in Corporate Governance*, 34 CORNELL INT'L L.J. 321 (2001); Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599 (2000).

179. *See* Stulz & Williamson, *supra* note 102; Thorsten Beck, Asli Demirguc-Kunt & Ross Levine, *Law, Endowments, and Finance*, J. FIN. ECON. (forthcoming 2004).

180. Amir N. Licht, et al, *Culture, Law, And Corporate Governance*, INT'L REV. L. & ECON. (forthcoming 2004).

181. *Id.* The measures of formalism in civil litigation rules were drawn from Simeon Djankov et al., *Courts: The Lex Mundi Project*, 118 Q. J. ECON. 453 (2003).

182. *See* Oscar G. Chase, *Legal Processes and National Culture*, 5 CARDOZO J. INT'L & COMP. L. 1, 17-18 (1997). *See generally* MIRJAN DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS (1974-1975).

183. AMIR N. LICHT, CHANAN GOLDSCHMIDT & SHALOM H. SCHWARTZ, CULTURE RULES: THE FOUNDATIONS OF THE RULE OF LAW AND OTHER NORMS OF GOVERNANCE (Working Paper, 2003).

184. South Korea is not included in the sample used in this study.

185. Socrates's refusal to escape from jail after the city of Athens sentenced him to death is often presented as the classic exposition of arguments for the duty to obey the law and, generally, for the importance of the rule of law for social order. At about the same time, in equally powerful terms Confucius derided the rule of law as a means for establishing social order in China. On Socrates, see M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950 (1972-1973); Philip Soper, *Another Look at the* Crito, 41 AM. J. JURIS. 103 (1996); Frances Olsen, *Socrates on Legal Obligation: Legitimation Theory and Civil Disobedience*, 18 GA. L. REV. 929 (1984). On Confucius, see William P. Alford, *On the Limits of 'Grand Theory' in Comparative Law*, 61 WASH. L. REV. 945 (1986); Albert H.Y. Chen, *Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law*, 17 UCLA PAC. BASIN L.J. 125 (1999-2000).

sources other than the law.[186] As a result, reforms in governance systems that rely on legislative amendments are bound to face serious challenges in their implementation phase. *A fortiori*, efforts to upgrade a Korean issuer's corporate governance by adding an external layer of *foreign* rules and regulations through cross-listing—beneficial as they might be—are likely to meet even greater hurdles. To the issuer's management, accountants, and similar parties, the foreignness of such rules and regulations is not only technical, but fundamental.

D. Policy Implications

This section has made considerable forays beyond the areas usually covered in discussions of corporate governance and securities regulation. The immediate motivation for this was the recently-gained recognition that standard economic and financial factors cannot fully explain the observed patterns in cross-listings—in particular, the weakness of evidence in support of the bonding hypothesis. In the present context, the findings surveyed in this section provide concrete content to the somewhat fuzzy notions of familiarity, foreignness, and cultural distance among nations, securities markets, issuers, and investors.

These findings have direct implications for policy-makers and business people. Bernard Black has noted that in order to develop well-functioning securities markets, a country would need to ensure that a host of appropriate legal, regulatory, professional, and cultural elements are in place.[187] This elaborate social infrastructure is needed for combating insiders' resourcefulness in illegitimately deriving private benefits from public corporations. Cross-listing on a well-regulated market would serve as a short-cut for issuers interested in self-improving their corporate governance beyond the level provided by their home country's regime. This piggybacking strategy relies on an implicit assumption that the destination-market's regime would mesh smoothly with the issuer's existing regime. To use the legal plug-in metaphor, the plug-in regulatory components provided even by the better-regulated destination markets do not add much force to issuers' governance systems (and in some cases actually could downgrade them).[188] This section has shown that differences among nations may lead to regulatory components failing to plug-in into foreign issuers' governance systems. With greater distance—geographical, cultural, or other—between an issuer's origin and destination markets come greater challenges to utilizing the destination market's regulatory regime.

Yet the policy implications of cultural distance go much deeper than pointing to limits to the usefulness of cross-listing for corporate governance improvement. Nor would one argue in earnest that foreign legal elements can be adopted by another legal system without at least some adaptation. The theory and preliminary evidence on cultural emphases and cultural distance contribute to the analysis and design of legal reform by pointing out the magnitude of

186. For a general insightful discussion of the current situation in Korea, see Chaihark Hahm, *Law, Culture, and the Politics of Confucianism*, 16 COLUM. J. ASIAN L. 253 (2003).

187. *See* Black, *supra* note 9.

188. Licht, *Bonding or Avoiding*, *supra* note 10.

potential resistance by receiving countries, or corporations, to foreign legal elements. Cultural orientations represent general societal emphases that are deeply ingrained in the functioning of major societal institutions, in widespread practices, in symbols and traditions, and, through adaptation and socialization, in the values of individuals. The theories and data that underlie the present discussion suggest that cultural orientations change slowly over time spans of decades and centuries. As a result, cultural value emphases may preserve and perpetuate the imprint of ancient intellectual legacies and historical initial conditions.[189]

The foregoing discussion leads to a more fundamental issue. Various rationales underlie the predominance of Anglo-American features in current blueprints for reform in corporate governance and securities regulation regimes. The dominance of American and British institutional investors in the global securities market creates a demand for familiar features, which are hopefully effective for minority investors like them. In part, this dominance may be a derivative of the United States' prominence in international organizations like the World Bank and the IMF. In part, it is supported by the evidence cited in the introduction.[190] Yet as we have seen, the implementation of these models in other countries faces considerable obstacles. Furthermore, in the wake of the 2002 wave of scandals in the United States, this system no longer is perceived as optimal.

The architects of corporate governance reform may want to consider the idea of culturally compatible governance. For instance, Korea has done quite well with its own version of corporate governance, based on an amalgam of imported legal elements and local practices. Although the system collapsed, it also rebounded, most likely thanks to its own qualities more than to the reforms in law and accounting principles. It is true that the Korean corporate governance system could be improved—and must improve in order to compete in global markets. The far-reaching reliance on American models may bring about some improvement. But Korean reformers could devise better corporate governance that draws on the country's huge social capital that its cultural endowment embodies.

Indeed, Koreans today seem to treat their Confucian heritage with ambivalence.[191] In the current political ideological landscape in Korea, people who champion ideals of democracy would also argue that the Confucian heritage still found in Korean society has no legitimate space. "According to this conception, Confucianism represented hierarchy, feudalism, elitism, and male domination, and an enlightened, democratic, and progressive Korean nation had no use for such things."[192] Yet by ignoring the potential value of this endowment the re-

189. *See* Licht, et al., *supra* note 180, *Modernization, Cultural Change, and the Persistance of Traditional Values*, 65 AM. SOCIOLOGICAL REV. 19 (2000); Shalom H. Schwartz & Maria Ros, *Values in the West: A Theoretical and Empirical Challenge to the Individualism-Collectivism Cultural Dimension*, 1 WORLD PSYCHOL. 93 (1995).

190. For a comprehensive analysis, see MARCO BECHT, PATRICK BOLTON & AILSA ROELL, CORPORATE GOVERNANCE AND CONTROL (NBER, Working Paper No. 9371, 2002).

191. Hahm, *supra* note 186, at 66-267, 277, 297-98.

192. *Id.* at 298.

forms resemble an attempt to write-off Korea's Confucian heritage as an economically productive asset. Designing a culturally-compatible governance model that would leverage this social capital and put it to modern productive use exceeds the scope of this article and is left to future research.

III.
INFORMATIONAL DISTANCE REVISITED

The research evidence showing that informational distance is a major determinant in cross-border listing and trading is related by researchers to cultural affinities between countries, as expressed with language, common colonial heritage and so on. This view is closely related to the conceptual definition of cultural distance that is based on the need for knowledge, on the one hand, and barriers to knowledge flow on the other hand. This section adds another perspective to question the governance-improving effect of cross-listing. Cross-listing opens new avenues for corporate insiders to take advantage of public shareholders by trading on inside information. Instead of ameliorating the adverse effects of moral hazard due to information asymmetries, cross-listing may in fact exacerbate them. Recalling that cross-listing is supposed to facilitate the flow of information between firms and investors who are located in different countries, cultural distance can either facilitate or hinder this effect. The greater the cultural distance between home and host countries is, the hypothesis goes, the larger is the informational asymmetry between them and the more difficult it is to close this informational gap through cross-listing.

Two strands of research in international finance bear on the relevant issues, namely, asset pricing in international securities markets and market microstructure. Both topics are technical and relatively less accessible, yet they entail policy implications in the present context and are discussed in turn.

A. International Information Asymmetry

A well-documented phenomenon in international securities markets is the home bias.[193] Basic financial prudence calls for diversifying idiosyncratic risks in investors' portfolios to the extent possible. Such diversification would also include international diversification so as to minimize country-specific risks.[194] Yet investors exhibit a home bias by overweighing the domestic market in their

193. For literature reviews on home bias, see G. Andrew Karolyi & Rene M. Stulz, *Are Financial Assets Priced Locally or Globally?*, *in* THE HANDBOOK OF THE ECONOMIC OF FINANCE (George Constantinides, Milton Harris & Rene M. Stulz eds., forthcoming) (NBER, Working Paper No. 8994, 2002); Karen K. Lewis, *Trying to Explain Home Bias in Equities and Consumption*, 37 J. ECON. LIT. 571 (1999). Seminal works on the home bias include Jun-Koo Kang and Rene M. Stulz, *Why Is There a Home Bias? An Analysis of Foreign Portfolio Equity Ownership in Japan*, 46 J. FIN. ECON. 3 (1997); Linda L. Tesar & Ingrid M. Werner, *Home Bias and High Turnover*, 14 J. INT'L MONEY & FIN. 467 (1995); Ian Cooper & Evi Kaplanis, *Home Bias in Equity Portfolios, Inflation Hedging, and International Capital Market Equilibrium*, 7 REV. FIN. STUD. 45 (1994); Kenneth R. French & James M. Poterba, *Investor Diversification and International Equity Markets*, 81 AM. ECON. REV. 222 (1991).

194. *See supra* note 19.

portfolios. This phenomenon persists despite the collapse of many barriers that previously segmented securities markets.[195] As securities markets become more integrated, researchers pay more attention to information asymmetries among market players in an attempt to explain the home bias and other phenomena, which show that location matters.

Major advances in telecommunication technology notwithstanding, geographical proximity to information sources still confers substantial benefits on those closer to such sources even at the domestic level.[196] This informational advantage encourages investors to prefer stocks that are closer to them, thus supporting a home bias at the domestic level.[197] At the international level, the picture is more complicated. It may be more accurate to refer to an "informational distance" in this context rather than just geographical distance. Several factors may affect firms' informational distance from investors. Firstly, geographical distance at the international level operates as at the domestic level in putting more distant investors at a relative disadvantage.[198] In a similar vein, but based on other aspects of foreignness, it has been shown that language and

195. *But see* ALAN G. AHEARNE, ET AL., INFORMATION COSTS AND HOME BIAS: AN ANALYSIS OF U.S. HOLDINGS OF FOREIGN EQUITIES (Working Paper, Federal Reserve Board, 2000) (arguing that transaction costs associated with investment in foreign stocks, while economically insignificant, do exhibit a statistically significant relation to U.S. holdings of foreign stocks); SOHNKE M. BARTRAM & GUNTER DUFEY, INTERNATIONAL PORTFOLIO INVESTMENT: THEORY, EVIDENCE, AND INSTITUTIONAL FRAMEWORK (Working Paper, 2001), *available at* http://papers.ssrn.com/paper.taf?abstract_id=270196 (arguing that there are many institutional constraints and barriers for international portfolio investment, significant among them a host of tax issues, which support the case for internationally segmented securities markets). *See also* ALEXANDER MICHAELIDES, INTERNATIONAL PORTFOLIO CHOICE, LIQUIDITY CONSTRAINTS AND THE HOME EQUITY BIAS PUZZLE (CEPR, Discussion Paper No. 3066, 2001), *available at* http://papers.ssrn.com/paper.taf?abstract_id=292311 (presenting a model in which the benefits of international diversification are limited because consumption fluctuations can be smoothed with a small amount of buffer stock saving, while exchange rate risk makes foreign investments less appealing to risk averse investors).

196. *See* Harald Hau, *Location Matters: An Examination of Trading Profits*, 56 J. FIN. 1959 (2001) (arguing that distance from Frankfurt advantages proprietary traders trading in German stocks).

197. *See* Joshua D. Coval & Tobias J. Moskowitz, *Home Bias at Home: Local Equity Preference in Domestic Portfolios*, 54 J. FIN. 2045 (1999) (showing that the weight of U.S. stocks in U.S. mutual funds is negatively related to the distance between the location of the fund and location of firms' headquarters); Joshua D. Coval & Tobias J. Moskowitz, *The Geography of Investment: Informed Trading and Asset Prices*, 109 J. POL. ECON 811 (2001) (finding mutual fund managers do better with stocks of firms located more closely to where the fund is located); *see also* Tom Arnold, Phil Hersch, J. Harold Mulherin & Jeff Netter, *Merging Markets*, 54 J. FIN. 1083 (1999) (demonstrating that U.S. firms in the early twentieth century tended to locate on exchanges near company headquarters).

198. *See* Harald Hau, *Geographic Patters of Trading Profitability, in Xetra*, 45 EUR. ECON. REV. 757 (2001) (finding foreign traders underperform at intraday, intraweek, and intraquarter trading horizons, confirming the hypothesis of financial market segmentation due to international information barriers); Mark Grinblatt & Matti Keloharju, *The Investment Behavior and Performance of Various Investor Types: A Study of Finland's Unique Data Set*, 55 J. FIN. ECON. 43 (2000); Mark Grinblatt & Matti Keloharju, *How Distance, Language, and Culture Influence Stockholdings and Trades*, 56 J. FIN. 1053 (2001) [hereinafter *Distance, Language, Culture*] (in a sample of Finnish stocks, investors are more likely to hold, buy and sell the stocks of Finnish firms that are located close to the investor); *see also* R.K. Shukla & G.B. Van Inwegen, *Do Locals Perform Better than Foreigners? An Analysis of UK and US Mutual Fund Managers*, 47 J. ECON. BUS. 241 (1995) (demonstrating UK money managers underperform American money managers in picking U.S. stocks).

cultural differences (loosely defined) correlate positively with investors' preferences for particular stocks.[199] The quality of corporate governance in firms' home country may also affect the degree of home bias.[200] On the other hand, since foreign investors tend to be large institutions they are more likely to have better resources for managing their portfolios and, generally, be more sophisticated.[201]

Choe, Kho, and Stulz examined whether domestic investors have an information advantage over foreign investors with regard to individual stocks traded on the Korean Stock Exchange from end-1996 to end-1998.[202] Foreign investors were found to buy at significantly higher prices and sell at significantly lower prices than domestic individuals for medium and large trades. Foreign institutions are less disadvantaged relative to domestic institutions than relative to individual investors. Moreover, foreign investors are significant net buyers before a negative abnormal return event and significant net sellers before a positive abnormal return event. Whereas foreigners do not trade ahead of the event day, it appears that domestic investors do. Foreign investors also trade at worse prices than domestic individuals typically do.[203] These and additional findings suggest that individual Korean investors systematically take advantage of foreign investors. Although the magnitude of this disadvantage may not be substantial for long-term institutional investors, potential buyers of Korean ADRs will be alarmed by these findings.

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199. *See* PORTES & REY, *supra* note 48; Grinblatt & Keloharju, *Distance, Language, Culture*, *supra* note 197 (investors are more likely to hold, buy and sell the stocks of Finnish firms that communicate in the investor's native tongue, and that have chief executives of the same cultural background); *see also* DUSAN ISAKOV & FREDERIC SONNEY, ARE PRACTITIONERS RIGHT? ON THE RELATIVE IMPORTANCE OF INDUSTRIAL FACTORS IN INTERNATIONAL STOCK RETURNS (Working Paper, 2002), *available at* http://papers.ssrn.com/paper.taf?abstract_id=301536 (in a sample of more than 4000 stocks quoted in 20 countries. finding that on average the country effect dominates industrial effects over stock returns during 1997-2000).

200. *See* RENE M. STULZ, MAGNUS DAHLQUIST, LEE PINKOWITZ & ROHAN WILLIAMSON, CORPORATE GOVERNANCE, INVESTOR PROTECTION, AND THE HOME BIAS (Working Paper, 2002) (arguing that the prevalence of closely held firms in countries with poor investor protection explains part of the home bias of U.S. investors). It is not entirely clear what causal factors drive the results reported in this study. While it makes sense for investors to avoid stocks of firms whose insiders are more likely to exploit public shareholders, this increased likelihood should be reflected—at least roughly—in the stocks' prices. The rationale for portfolio diversification is not to buy only "good" stocks; "bad" stocks from foreign countries should be a valuable addition to a portfolio provided they are discounted appropriately. A more fundamental factor may prevent foreign issuers from being able to correctly price these stocks. Cultural differences seem like a good candidate for such a factor—a conjecture that deserves further analysis.

201. *See* Magnus Dahlquist & Goran Robertsson, *Direct Foreign Ownership, Institutional Investors, and Firm Characteristics*, 59 J. FIN. ECON. 413 (2001) (arguing that the bias in foreign holdings is more a bias in the type of foreign investor, as international investing is primarily done by institutions, than due to preferences in foreign stock characteristics); MARK SEASHOLES, SMART FOREIGN TRADERS IN EMERGING MARKETS (Working Paper, 2000) (foreign investors buy (sell) ahead of good (bad) earnings announcements in Taiwan while local investors do the opposite, suggesting that the foreigners are more sophisticated).

202. *See* HYUK CHOE, BONG-CHAN KHO & RENE M. STULZ, DO DOMESTIC INVESTORS HAVE MORE VALUABLE INFORMATION ABOUT INDIVIDUAL STOCKS THAN FOREIGN INVESTORS? (NBER, Working Paper No. 8073, 2001).

203. *Id.* at 2-4.

B. Dominant Markets and Informed Trading

Cross-listing can affect the home bias by mitigating some aspects of foreign stocks' informational distance. For example, U.S. exchange-listed foreign firms report in English and reconcile their financial statements to U.S. GAAP.[204] American investors may thus consider these firms more familiar and increase their holdings in them.[205] Yet, as it brings foreign stocks closer to investors, cross-listing also brings innocent (or at least less-informed) investors closer to unscrupulous insiders. Cross-listing may thus make investors in host markets more likely to get exploited by better-informed traders. By connecting the home market with the foreign host market, cross-listing increases the opportunities for insiders to profit from private information. This argument was presented in detail elsewhere based on then available theory and evidence.[206] More recent research informs this discussion and the policy implications stemming from it.

A common wisdom in the theory of market structure used to be that stock markets are bound to consolidate.[207] The underlying logic of this prediction was that market liquidity engenders positive network externalities and therefore "liquidity attracts liquidity."[208] Greater liquidity improves the ability of markets to perform their primary function of facilitating trading by matching buyers and sellers and enabling them to effect trades on the best possible terms. Therefore, one big market would be better than two small ones.[209]

Although stock exchange consolidation is already under way and is likely to continue to some degree,[210] it is doubtful that market fragmentation will ever disappear. Even the most sophisticated markets, such as the NYSE, exhibit fragmentation features both in time (through continuous trading) and in space (the "upstairs" market). It seems that fragmentation helps the market to function by catering to participants with special needs.[211] Lipson presents a model that extends this logic to international markets in cross-listed stocks.[212] In this respect, financial factors will always be second to national support for the mainte-

204. As opposed to foreign firms that only use Level I ADRs.

205. *See* AHEARNE ET AL., *supra* note 1954 (showing that the portion of a country's market that has a public U.S. listing is a major determinant of a country's weight in U.S. investors' portfolios).

206. *See* Licht, *supra* note 8, at 590-602.

207. For a review, see Norman S. Poser, *The Stock Exchanges of the United States and Europe: Automation, Globalization, and Consolidation*, 22 U. PA. J. INT'L ECON. L. 497 (2001).

208. *See, e.g.*, Carmine Di Noia, *Competition and Integration Among Stock Exchanges in Europe: Network Effects, Implicit Mergers and Regulatory Considerations*, 7 EUR. FIN. MGMT. 39 (2001); Alberto Cybo-Ottone, Carmine Di Noia, & Maurizio Murgia, *Recent Developments in the Structure of Securities Markets*, *in* BROOKINGS-WHARTON PAPERS ON FINANCIAL SERVICES 2000 223 (Robert Litan & Anthony Santomero eds., 2000).

209. This point is also the starting point for Coffee's theory on bonding by cross-listing. Coffee, *supra* note 32, at 3-4. The following analysis thus bears on this theory as well.

210. *See* Amir N. Licht, *Stock Exchange Mobility, Unilateral Regulation, and the Privatization of Securities Regulation*, 41 VA. J. INT'L L. 583 (2001); STIJN CLAESSENS, DANIELA KLINGEBIEL & SERGIO L. SCHMUKLER, EXPLAINING THE MIGRATION OF STOCKS FROM EMERGING ECONOMIES TO INTERNATIONAL CENTERS (World Bank, Working Paper, 2002).

211. *See* Ananth Madhavan, *Market Microstructure: A Survey*, 3 J. FIN. MARKETS 205 (2000).

212. *See* MARC L. LIPSON, FRAGMENTATION, CONSOLIDATION AND COMPETITION FOR LISTINGS (Working Paper, 2002).

nance of a national stock market. With regard to policy implications and regulatory concerns, attention should be better paid to the serious issues that arise in the current situation.

When a stock is cross-listed on more than one market, constant arbitrage activity takes place between these markets, causing the price of the stock to behave as if it is generated by a single process.[213] Yet these markets do not have an equal role in the price formation process. In practice, one market functions as the dominant market in that it tends to lead the movement of prices. The other markets function as satellites, constantly chasing price movements in the dominant market and occasionally contributing to price formation. There is now ample evidence showing that the home markets of cross-listed firms dominate the price formation process.[214] This is consistent with the evidence on informational asymmetries in trading and in holdings of foreign securities that favor the home countries.

The integrity of the price discovery process is a matter of great import. In its seminal decision in *Basic Inc. v. Levinson*, the U.S. Supreme Court held that "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price."[215] This presumption of reliance rests on an underlying assumption about the informational efficiency of the major markets in the United States. It also relies on the assumption that all material information concerning the issuer had been disclosed. Insiders are prohibited from trading on material non-public information.[216] In practice, American insiders do trade on inside information,[217] but the levels of insider trading in other countries appear to be considerably higher.[218]

213. For a review of studies on international arbitrage and the "law of one price" in cross-listed stocks, see Licht, *supra* note 8, at 590-96.

214. *See* Shmuel Hauser, Yael Tanchuma & Uzi Yaari, *International Transfer of Pricing Information Between Dually Listed Stocks*, 21 J. FIN. RES. 139 (1998); Kenneth A. Froot & Emil Dabora, *How Are Stock Prices Affected By The Location Of Trade?*, 53 J. FIN ECON. 189 (1999); CHEOL S. EUN & SANJIV SABHERWAL, PRICE DISCOVERY FOR INTERNATIONALLY TRADED SECURITIES: EVIDENCE FROM THE U.S.-LISTED CANADIAN STOCKS (Working Paper, 2000); JOACHIM GRAMMIG, MICHAEL MELVIN & CHRISTIAN SCHLAG, PRICE DISCOVERY IN INTERNATIONAL EQUITY TRADING (Working Paper, 2001); MAGUEYE DIA, THE ALLOCATION OF LIQUIDITY AND PRICE DISCOVERY ACROSS EXCHANGES AFTER MULTINATIONAL MERGERS (Working Paper, 2001). The host market may play a more significant role in price discovery if substantial shareholding develops in the host country, or when the economies of the two countries are highly integrated in general, as is the case for Canada and the U.S. *See* EUN & SABHERWAL, *supra* this note.

215. 485 U.S. 224, 247 (1988). The Court commented further that "Congress expressly relied on the premise that securities markets are affected by information, and enacted legislation to facilitate an investor's reliance on the integrity of those markets." *Id.* at 246.

216. The scope of persons potentially liable for insider trading under American law is ambiguous, but there is no doubt that company insiders are subject to this prohibition. For a discussion see Richard W. Painter, Kimberly D. Krawiec & Cynthia A. Williams, *Don't Ask, Just Tell: Insider Trading After United States v. O'Hagan*, 84 VA. L. REV. 153 (1998).

217. *See, e.g.*, Lisa Muelbroek, *An Empirical Analysis of Illegal Insider Trading*, 47 J. FIN. 1661 (1992) (insiders profit from insider trading); Asjeet S. Lamba & Walayet A. Khan, *Exchange Listings and Delistings: The Role of Insider Information and Insider Trading*, 3 J. FIN. RES. 131 (1999) (finding insiders act on their private information before exchange listings and delistings).

218. *See* Utpal Bhattacharya & Hazem Daouk, *The World Price Of Insider Trading*, 57 J. FIN. 75 (2002); OLESYA V. GRISHCHENKO, LUBOMIR P. LITOV AND JIANPING MEI, MEASURING PRIVATE INFORMATION TRADING IN EMERGING MARKETS (Working Paper, 2002) (finding strong evidence of

How does cross-listing affect the incidence of insider trading in the issuer's stock? Market structure scholars previously differed on this point.[219] To see the problem, consider a simple setting first. When one party to a transaction has superior information, the other, less-informed party is bound to lose. Theoretical models of market trading usually consider an informed trader, a market professional, and an uninformed trader. The latter trader is sometimes referred to as a "noise trader," since she lacks actual information on firm value, or as a "liquidity trader," since she may be motivated by liquidity considerations.[220] Liquidity traders are the constituency that is typically being exploited by informed traders. However, market professionals too may find themselves facing an informed trader without knowing it. In a single market, these professionals will respond by adjusting their buy and sell prices (or quotes) to the likelihood of transacting with an informed trader.

The next step is to move to a multi-market environment. In this setting, two or more markets compete with each other for the flow of order. Beyond lowering transaction costs, markets could also compete over their level of integrity. Two strands of arguments can be identified on this issue. Chowdhry and Nanda advanced a theoretical model in which market makers divulge trading information more fully, by making the trading process more transparent, in order to discourage trading by informed traders or insiders.[221] The competitive dynamics that emerges is for the "cleaner" market, as market makers "race-for-the-top" in cracking down on insider trading. The more stringent market succeeds in attracting most of the trading.

Another line of studies reaches opposite conclusions. Madhavan presented a model in which in addition to informed and uninformed traders, there are also large liquidity traders (such as institutional investors) who would like to work their positions gradually into the market and split them between markets.[222] In this setting, fragmentation and lesser transparency is the equilibrium, and there is no race for the top. Consequently, informed traders can also conceal their trades more easily. Finally, a recent study by Nuno Martins presents a theoretical model in which information asymmetries between investors drive the foreign listing decision. Strikingly, the model predicts that as information asymmetries increase, an international listing will benefit the domestic informed traders. With cross-listing of the firm, domestic informed traders increase the volume of trading as they now have additional means to take advantage of the less in-

return continuation following high volume days, suggesting the presence of private information trading in emerging markets).

219. For a detailed analysis, see Licht, *supra* note 8, at 596-602.

220. The seminal works include Albert S. Kyle, *Continuous Auctions and Insider Trading*, 53 ECONOMETRICA 1315 (1985); Anat R. Admati & Paul Pfleiderer, *A Theory of Intraday Patterns: Volume and Price Variability*, 1 REV. FIN. STUD. 3 (1988).

221. *See* Bhagwan Chowdhry & Vikram Nanda, *Multimarket Trading and Market Liquidity*, 4 REV. FIN. STUD. 483 (1991).

222. *See* Ananth Madhavan, *Consolidation, Fragmentation, and the Disclosure of Trading Information*, 8 REV. FIN. STUD. 579 (1995). An earlier model along similar lines is RUTH J. FREEDMAN, INTERNATIONAL CROSSLISTING: A THEORETICAL AND EMPIRICAL ANALYSIS (unpublished Ph.D. dissertation 1991) (on file with author).

formed international traders. Martins' evidence strongly confirms this prediction.[223]

Empirical studies conducted until the late 1990s looked mostly at the impact of cross-listing on trading volume and return variance. These studies were unable to reach unequivocal conclusions.[224] Martins studies equity issues by firms from emerging markets and reaches findings consistent with his theoretical predictions.[225] In a carefully designed study of cross-listed Dutch stocks, Menkveld is able for the first time to provide evidence on traders who prefer to trade during overlap trading hours in New York and Amsterdam and to split their orders across markets.[226] In particular, the results more strongly support the proposition that it is informed traders, rather than large liquidity traders, who split their orders across markets.[227]

In conclusion, cross-listing entails more than just subjecting the issuer to the host market's regulatory regime; it also subjects the host market to potentially adverse effects coming from the issuer's home county. It does not matter which market ends up with the larger portion of trading volume. In a multi-market environment, the home market is more likely to retain its informational advantage, and insiders are better able to profit from this advantage.

CONCLUSION

This article has explored a new aspect of much discussed issues in corporate governance reform and cross-listing of securities: the role of cultural and informational distance. The present analysis enriches current discussions by adding a dimension of cultural analysis, as it has developed in cultural and cross-cultural psychology. The analysis offered here is not intended to replace or trump analyses that draw on other approaches, most notably, an economic analysis approach. To the contrary, this article serves to demonstrate that these lines of inquiry can, and should be combined.

223. MARTINS, *supra* note 41, at 9.
224. *See* Licht, *supra* note 8, at 600-01.
225. *See* MARTINS, *supra* note 41, at 12.
226. *See* ALBERT J. MENKVELD, SPLITTING ORDERS IN FRAGMENTED MARKETS EVIDENCE FROM CROSS-LISTED STOCKS (Working Paper, 2001), *available at* http://www.fese.be/delavega /2001/jvp2001_menkveld_paper.pdf.
227. *Id.* at 30.

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The Political Economy of the Production of Customary International Law: The Role of Non-governmental Organizations in U.S. Courts

By
Donald J. Kochan*

INTRODUCTION

"US plaintiffs' lawyers have revived a dormant 18th-century law and made it their chief weapon in a 21st-century battle over corporate responsibility in an age of globalisation," says *Financial Times* columnist Patti Waldmeir, in a March 14, 2003 article.[1] These lawyers are accomplishing this development "in the best traditions of American legal creativity."[2] Creativity, indeed, is a driving force here. Perhaps more importantly, the creation of "law" by a group of international organizations, which produce statements of "norms" and purport to speak for the world, has fueled this development.

The law in question is the Alien Tort Statute ("ATS"),[3] and its consequences are increasingly far reaching. Terry Collingsworth, one of the international labor activists who spearheaded many of these lawsuits, claimed that the ATS is a "vital tool for preventing corporations from violating fundamental human rights."[4] Dissatisfied with traditional means of influence, Collingsworth (Executive Director of the International Labor Rights Fund), has no reservations

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1. Patti Waldmeir, *An abuse of power: US courts should not punish companies for human rights violations committed overseas*, FIN. TIMES, Mar. 14, 2003, at 12.

2. *Id.*

3. 28 U.S.C. § 1350 (2003).

4. Terry Collingsworth, *The Alien Tort Claims Act – A Vital Tool for Preventing Corporations from Violating Fundamental Rights*, INTERNATIONAL LABOR RIGHTS FUND, *at* http://www.laborrights.org/publications (Jan. 2003).

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on stating that his interest group wants to "push the envelope" regarding the enforceability of "international law" in U.S. courts against overseas corporate conduct.[5] More and more, other interest groups find themselves disposed to do the same.

Seen as a vital tool for accountability by many interest groups, the ATS is also a vital catalyst for interest group investment in the *production* of "international law." The ever-growing prospect of enforceability in U.S. courts dramatically increases the return on such investment.

ATS litigation is only recently receiving what approaches widespread attention, but it marks an important new trend in tort law that demands critical analysis. This article argues that the increasing judicial acceptance of tort claims based on "international law" creates self-interested, rather than public-interested, incentives for the *production* of "international law." Furthermore, this article also claims that interest groups have exploitable and unbalanced means for achieving such production.

Increasingly, U.S. courts are recognizing various treaties, as well as resolutions, understandings, declarations, proclamations, conventions, programmes, protocols, and similar forms of inter- or multi-national "legislation" as evidence of a body of "customary international law" enforceable in domestic courts, particularly in the area of tort liability. These instruments, referred to herein as customary international law outputs ("CILOs"), are seen by some courts as evidence of *jus cogens* norms that bind not only nations and state actors, but also private individuals. Such enforceability has occurred in U.S. courts even where such customary international law outputs have not been codified or otherwise adopted by the U.S. Congress.

The most obvious evidence of this trend is in the proliferation of lawsuits against corporations with ties to the United States for alleged violations of customary international law during development projects abroad. Such lawsuits are most often brought under the federal Alien Tort Statute ("ATS") (or Alien Tort Claims Act ("ATCA")[6]), 28 U.S.C. § 1350, which has seen an evolution in the past twenty-three years after remaining dormant for nearly 200 years since its passage with the Judiciary Act of 1789.

Although relatively few suits have invoked it, the ATS has not escaped popular attention lately. In commenting on the ongoing ATS suit against oil giant Unocal, *The Economist* in its April 24, 1999 issue described the potential implications of this new trend in tort litigation. The article explicated, "The next big test will be whether the Alien Tort Claims Act can be used against companies as well as individuals."[7] And, if companies begin losing in this emerging field of litigation, it could "provide a major headache for many American com-

5. Terry Collingsworth, Alien Tort Claims Lawsuits: Advancing Human Rights Or Undermining U.S. Businesses And Policy?, Statements at Washington Legal Foundation Media Briefing (Mar. 12, 2003) (on file with author).

6. *See generally*, Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002) (explaining that "Alien Tort Statute" is preferable to "Alien Tort Claims Act" if one believes that § 1350 does not create a cause of action).

7. *Human-Rights Trials: To Sue a Dictator*, THE ECONOMIST, Apr. 24, 1999, at 26.

panies operating abroad."[8] When discussing an award against Serbian leader Radovan Karadzic, an August 2000 *Washington Post* editorial called the new line of ATS human rights cases "troubling" as "proceed[ing] under an ill-conceived but now well-accepted reading of a 1789 law that . . . is a modern graft on a largely moribund statute; international human rights law did not exist in the 18th century."[9] Furthermore, a staff report from the *Corporate Legal Times* summed up the current situation with the following headline in October 2002: "No Longer Satisfied With Destroying the Reputations of Corporations That Get Entangled in Human Rights Abuses Overseas, Activist Groups are Seeking Retribution in U.S. Courts."[10] In November 2002, a *Financial Times* article opined that the current ATS jurisprudential trend presents a "danger that the US judicial system will become the world's civil court of first resort."[11] Despite evidence of some attention, however, the ATS's potential impact seems largely unappreciated in the popular press and among popular minds.

The evolution of ATS litigation began in 1980 when lawyers raised the ATS from dormancy and a federal appeals court found that suits based on customary international law for human rights abuses could be entertained under the ATS.[12] From here, it expanded most notably in 1995 when a federal appeals court held that quasi-public and even private actors might be bound by customary international law.[13] ATS litigation grew again in 1997 when a federal district court held that a private corporation was subject to ATS jurisdiction for alleged human rights abuses abroad.[14] Since then, dozens of lawsuits against private actors—principally corporations in extractive industries—have been filed.

The 2002 decision by the Ninth Circuit in *Doe v. Unocal Corp.*[15] is one of the latest expansions of the ATS, allowing customary international law tort suits against private actors. On February 14, 2003, the Ninth Circuit announced that it will rehear this case *en banc*.[16] Additionally, the U.S. District Court for the Southern District of New York also recently used an extremely expansive view of the ATS's reach in their March 19, 2003 decision of *Presbyterian Church of*

8. *Id.*

9. *Lawsuits and Foreign Policy*, WASH. POST, Aug. 12, 2000, at A20.

10. *See* Robert Vosper, *Conduct Unbecoming; No Longer Satisfied With Destroying the Reputations of Corporations That Get Entangled in Human Rights Abuses Overseas, Activist Groups are Seeking Retribution in U.S. Courts*, CORP. LEG. TIMES, Oct. 2002, at 35.

11. Thomas Niles, *The Very Long Arm of American Law*, FIN. TIMES, Nov. 6, 2002, at 15.

12. Filartiga v. Pena-Irala, 630 F.2d 876, 877 (2d Cir. 1980).

13. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

14. Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997) (upholding subject matter jurisdiction under ATS based on allegations that an American oil company, acting in concert with the Burmese government, committed various civil and human rights abuses), *aff'd in part & rev'd in part*, Nos. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), *reh'g en banc granted, opinion vacated by* Nos. 00-56603, 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003).

15. *Doe*, 2002 WL 31063976 *reh'g en banc granted, opinion vacated by* Nos. 00-56603, 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003).

16. *See Doe*, 2003 WL 359787, at *1; *see also* Pui-Wing Tam, *Appeals Court to Rehear Ruling On Unocal Human-Rights Suit*, WALL ST. J., Feb. 18, 2003, at B13.

Sudan v. Talisman Energy, Inc.[17] This court rejected a motion to dismiss by a Canadian energy company. Finding that the court had subject matter jurisdiction and that the complaint sufficiently alleged that the company aided and abetted or conspired with Sudan to commit violations of customary international law, the court further held that the violations were acts of torture, enslavement, war crimes, and genocide, and that Sudan's actions could be imputed to the company.[18]

However, in a major development on March 11, 2003, Judge Raymond Randolph of the D.C. Circuit Court of Appeals wrote a concurring opinion in *Al Odah v. United States,* which seriously calls into doubt the expansive reach of recent ATS judicial recognition.[19] *Al Odah* involved habeas corpus petitions brought against the United States by detainees in Guantanamo Bay, Cuba, that the court ultimately rejected.[20] The detainees premised part of their claims on the ATS and international law. The majority opinion saw no need to address the ATS or its proper interpretation, but Judge Randolph's concurring opinion in *Al Odah* did address that issue. His opinion constitutes one of very few judicial opinions to question the legitimacy of modern ATS application, and will undoubtedly serve as motivation for more critical judicial examination of the ATS in forthcoming decisions.

In *Al Odah*, Judge Randolph questioned many of the premises upon which ATS jurisprudential expansion has been based for the past twenty-three years. Randolph opined, "To have federal courts discover [customary international law] among the writings of those considered experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers."[21] It will be interesting to see how courts wrestling with ATS interpretation in the future will address Judge Randolph's reasoning.

In a similar interesting development in *United States v. Yousef*, the Second Circuit (heretofore one of the courts with the most expansive use of customary international law) on April 4, 2003, in a lengthy opinion, also called into question, and, some might say, took a newly restrictive view of the appropriate sources that courts may look to when attempting to define customary international law.[22] This "terrorism" decision will also undoubtedly affect the continuing debate on the ATS's expansive jurisprudence.

The development of law under these new causes of action is in its infancy, but has the potential to grow fast, and most indications show expansion of both the use and acceptance of international law claims. There are a number of driving forces, many of which aligned, attempting to push the envelope in ATS

17. 244 F. Supp. 2d 289 (S.D.N.Y. 2003).
18. *Id.*
19. 321 F.3d 1134 (D.C. Cir. 2003).
20. *Id.*
21. *Id.* at 1148.
22. 327 F.3d 56 (2d Cir. 2003) (holding *inter alia* that the United States could exercise extra-territorial criminal jurisdiction over defendants who were charged with attempted plane bombing in Southeast Asia).

jurisprudence—both in terms of the volume and the scope of acceptable customary international law claims. These forces include: scores of law review articles, amicus briefs and other actions by international law scholars and analysts;[23] the plaintiffs' bar; allegedly aggrieved aliens; and, of course, the principal subject of this article, nongovernmental organizations ("NGOs"). As this article will argue, the ATS debate is largely unbalanced and, to date, few countervailing forces have surfaced to challenge these expansion efforts.

The U.S. Supreme Court has been remarkably silent on the ATS. As one judge stated, for example, the ATS "cries out for clarification" from the Supreme Court,[24] yet the Court has never interpreted it in any context. It is likely that this may change soon, as many significant cases (including *Al Odah*) are resolved in the courts of appeal. However, with recent Supreme Court opinions citing customary international law outputs as persuasive authority[25] and some Supreme Court justices speaking publicly on the importance and influence of international and comparative law,[26] one can only speculate as to how the justices will address these developing issues. The Supreme Court may soon provide some insight as they just recently granted certiorari in *Al Odah.*[27] In addition, the Court granted certiorari in *Sosa v. Alvarez-Machain,* the case of an abduction of a drug dealer in Mexico that was conducted in such a way as to breach the alleged international law against unlawful and arbitrary abduction.[28] Although *Al Odah* does not concentrate on ATS issues, the Court may finally tackle the ATS in *Alvarez-Machain.*

There are several problems with the trend toward enforceability of "customary international law" in U.S. courts. This litigation trend suffers infirmities related to the Constitution, foreign policy, national security, and the public policies supporting economic development and its concomitant effect on the advance of democracy and political liberty. These concerns are principally

23. *See generally,* Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment,* 40 VA. J. INT'L L. 545 (2000); Harold Hongju Koh, *Is International Law Really State Law,* 111 HARV. L. REV. 1824 (1998).

24. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984) (Edwards, J., concurring).

25. *See, e.g.,* Grutter v. Bollinger, 123 S.Ct. 2325, 2347 (2003); Lawrence v. Texas, 123 S.Ct. 2472, 2481 (2003).

26. *See, e.g.,* Tony Mauro, *Court Shows Interest in International Law,* N.Y.L.J., July 14, 2003, at 1; *see also* Justice Sandra Day O'Conner, Keynote Address at the American Society of International Law Annual Meeting (Mar. 16, 2002), and Justice Stephen Breyer, The Supreme Court and the New International Law, Address at the American Society of International Law Annual Meeting (Apr. 4, 2003), *at* http://www.aclu.org/hrc/JudgesPlenary.pdf; Justice Ruth Bader Ginsburg, Looking Beyond our Borders: The Value of a Comparative Perspective in Constitutional Adjudication, Remarks for the American Constitution Society (Aug. 2, 2003), *at* http://www.acslaw.org/pdf/Ginsburg%20transcript%20final.pdf.

27. 124 S.Ct. 534 (2003).

28. 124 S.Ct. 807 (2003).

unaddressed in this article and left to past and future work of this author[29] and others.[30]

Part I of this article briefly provides a background of the ATS and the four principal waves of litigation that have made it a force in expanding tort liability in U.S. courts for violations of customary international law. Part II explains the increasing role NGOs play as self-interested actors in the production of customary international law outputs. Furthermore, the increase in options for enforceability of these outputs—such as under the ATS—should affect NGO behavior and strengthen their interest in shaping the production of customary international law outputs. Part II proceeds to explain that several factors give NGOs a heightened incentive to expand international tort liability a significant leg up over competitive interest groups wanting to curb such liability.

Moreover, Part II focuses on the dangers of enforceability of these customary international law outputs arising from four interrelated factors: (1) the lack of bicameralism and presentment associated with the development of the documents included in this judicially recognized body of customary international law—a process that otherwise increases the cost of legislation and thereby checks rent-seeking;[31] (2) the lack of formal elements of law associated with such customary international law outputs, whereas more formal, specific, and knowingly enforceable legislation is more difficult and expensive for an interest group to produce, and formality requirements to enforceability decrease production of laws while looser standards are cheaper and more easily produced; (3) unequal expectations of the parties in the bargaining process for the production of customary international law outputs; meaning that the parties have not been and are not always cognizant of both the benefits and costs of producing cus-

29. *See, e.g.*, Donald J. Kochan, *Constitutional Structure as a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act*, 31 CORNELL INT'L L.J. 153 (1998) [hereinafter Kochan, *Constitutional Structure*]; Donald J. Kochan, *After Burma*, LEGAL TIMES, Aug. 21, 2000, at 54; Donald J. Kochan, *Foreign Policy, Freelanced: Suits Brought under Alien Tort Claims Act Undermine Federal Government's Authority*, THE RECORDER, Aug. 23, 2000, at 5; Donald J. Kochan, *Rein in the Alien Tort Claims Act: Reconstituted Law of Nations Standard Needs Defining by Congress*, FULTON COUNTY DAILY REPORT, Aug. 24, 2000.

30. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 834-36 (1997); Bradley, *supra* note 6.

31. The primary phenomenon in the process described by the public choice theory, is that of "rent-seeking"—the process of expending resources in an effort to obtain favors from lawmaking institutions. *See* Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982). Interest groups seek to use the government to obtain legislative goods at a lower price than would be available in the market—with the difference in price constituting the "rent." Similarly, by successfully lobbying to impose regulations (and, therefore, costs) on a competitor, such as NGOs seeking to create legal liabilities for multinational corporations—the interest group can obtain a benefit at a lower cost to it than the market and impose higher costs on the competitor. Studying these behaviors is often known as examining the political economy or law & economics of the process of lawmaking. *See generally* TOWARDS A THEORY OF THE RENT-SEEKING SOCIETY (James Buchanan et al. eds., 1980); Daniel A. Farber & Philip Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987); Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971); Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988).

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tomary international law documents because enforceability was either unexpected or unknown; and (4) the resulting incentives for NGO rent-seeking from international bodies and development of such documents due to an increased value of such documents directly proportional to increased judicial enforceability. It is interesting to note that NGOs play a key role not only in the production of customary international law outputs, but are also spearheading most of the litigation aiming to add value to those instruments through judicial enforceability.

Part III predicts that NGOs will react to new enforcement opportunities and have a competitive advantage in the production of customary international law outputs that serve their interests. Once NGOs demand more production, they will likely get it, at least in the short run. Constraints on supply simply will not act as substantial barriers to production. As a result, customary international law outputs may be even less likely to reflect true international consensus and more likely to reflect the particular interests of certain groups.

As Ronald Cass, among others, has indicated, there has been a "noteworthy" absence of law and economics analysis in the field of international law.[32] Moreover, there is a "striking" lack of analysis of NGOs from a public choice perspective.[33] Less yet has the literature focused on interest group incentives to

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32. Cass notes:

> [I]t is noteworthy that only recently has there been a significant body of work utilizing economic analysis to assess the basis for agreements in international law, the interpretation of international agreements, and the effects of international law. . . . The relative paucity of economic analysis of international law issues is especially striking when compared to the proliferation of law and economics writing in other legal fields. . . . It is instructive that the listings for international law topics in the Bibliography of Law and Economics covers only one-and-a-half of the roughly 550 pages listing law and economics publications by subject.

Ronald A. Cass, *Economics and International Law*, 29 N.Y.U. J. INT'L L. & POL. 473, 474-76 (1997); *see also,* Charlene Denise Oliveira Cabral, *Are International Institutions Doing Their Job? International Law and Economics*, 90 AM. SOC'Y INT'L L. PROC. 109 (1996) (quoting panel comment of Alan Sykes that: "Law and economics started out in areas such as antitrust but has spread to tort, contract, property and crime, yet the international area has had a more robust immune system than the other fields."); Jeffrey L. Dunoff and Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 93 AM. J. INT'L L. 394 (1999); Jeffrey L. Dunoff and Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1 (1999); Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681 (1996-1997) [hereinafter Stephan, *Accountability*]; Joel P. Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis*, 17 NW. J. INT'L L. & BUS. 470 (1996-1997) (generally discussing the sparse economic analysis of the creation, application and enforcement of international economic agreements); Paul B. Stephan, *Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 745 (1995); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 193 (1993) ("To date, public choice scholarship has focused on the contemporary viability of institutional procedures designed to inhibit rent-seeking in domestic legislation.").

33. In discussing environmental NGOs, Zywicki offers the following:

> The failure to examine the political economy of environmental interest groups is striking, especially as the influence of environmental activists have [sic] grown both domestically and globally. They have proven especially influential as the proliferation of international bureaucracies, unelected and unaccountable to any voters, have increasingly assumed control over the implementation of environmental policies. With

invest in the production of customary international law, including the effect of judicial treatment of customary international law outputs. This article aims to help fill these gaps.

Furthermore, this article seeks to examine the potential incentives to push for the expansion of, and shape the substance of, production of customary international law outputs that may be created for NGOs as these outputs gain greater value as judicially enforceable instruments. It concludes that increased judicial enforceability of customary international law outputs removes a previously existing restraint on demand for their production. Because past customary international law outputs and the forums for the production of future customary international law outputs lack true interest group competition and lie outside traditional procedural safeguards against rent-seeking, those in favor of customary international law output production are at a substantial advantage in a world where these outputs are enforceable. Moreover, although economic theory would predict that interest group competition should balance the incentive for rent-seeking in favor of customary international law output production, there are several reasons to believe that special factors exist that will preclude or at least substantially delay such a balance and, therefore, ensure a substantial advantage for NGOs interested in achieving further customary international law output production.

I.
BACKGROUND: THE ATS AND ITS MODERN INCARNATION

The phrase "law of nations" was the early term for expressing international law, a concept then understood to be much more limited than it is today. In most contemporary literature, however, the "law of nations" is considered coterminous with "international law."[34] This "law" is unique because it purports to create universal obligations for all sovereign nation states and to somehow police the conduct of those nations. This "law" is also unique because many commentators feel that it evolves and even imposes obligations on non-state or private actors.[35] One of the principal means used to enforce adherence to this "international law" is the ATS. To understand the ATS, it is first important to

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respect to the activities of firms and individuals operating in the private market, the study of self-interest behavior in the private markets has comprised the core of economics at least since Adam Smith. Similarly, the public choice revolution has successfully applied the assumptions and tools of economics to explain much of the process and output of governmental activity. Little has been done, however, to apply economics to the study of the institutions that comprise civil society, "Non-Governmental Organizations" (more popularly, NGO's) that are neither private profit-maximizing entities nor public vote-maximizing entities.

Todd J. Zywicki, *Baptists? The Political Economy of Environmental Interest Groups*, (George Mason University Law and Economics, Working Paper Series No. 02-23) *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=334341 (citations omitted).

34. *See, e.g.*, Bradley & Goldsmith, *supra* note 30, at 822.

35. *See, e.g.*,William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the 'Originalists,'* 19 HASTINGS INT'L & COMP. L. REV. 221, 241-43 (1996) (arguing that international law is an evolving body that should be applied as that law exists at the time of suit); Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal*

briefly examine the historical treatment of rules for ascertaining the "law of nations."

A. *The Development of Judicial Rules for Ascertaining the Scope of the "Law of Nations"*

The Restatement (Third) of Foreign Relations asserts that customary international law is part of federal common law.[36] This assertion reflects the path most U.S. courts and judges have chosen in recent years when defining their competence to apply international legal principles to particular cases. Early cases, including *The Nereide*,[37] *United States v. Smith*[38] and *The Paquete Habana*,[39] established the now supposedly "unexceptionable" proposition[40] that the "law of nations" is included in the federal common law of the United States.[41]

The Nereide involved the issue of whether a Spanish shipper's goods carried aboard a British merchant vessel captured by American privateers could be condemned as prize. The shipper argued that, because Spain was a neutral party in the fighting between the United States and Great Britain and because the "law of nations" protected the property of neutrals, his property could not be taken as prize.[42] Chief Justice Marshall, writing for the Supreme Court, argued that, absent Congressional legislation, "the Court is bound by the law of nations which is a part of the law of the land."[43] Although this statement appears to conclude that international law is part of the general laws of the United States, Marshall was sitting in admiralty and thereby his statement can be read as addressing only the applicability of international law in admiralty cases.[44]

Smith entailed a prosecution for piracy involving the "plunder and robbery" of a Spanish vessel.[45] Thomas Smith, having participated in the piracy of the Spanish vessel, was prosecuted under an 1819 Act of Congress which stated, "That if any person or persons whatsoever, shall, upon the high seas, commit the crime of piracy, as defined by the law of nations . . . every such offender or

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Common Law, 66 FORDHAM L. REV. 463 (1997) (contending that evolving customary international law belongs in the courts).

36. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111, 112 (rev. ed. 1987); *see also* William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 480, 492, 511, nn.64-67, n.142, n.248 (1986); Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26 (1952); Beth Stephens, *The Law of Our Land: Customary International Law of Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997). *Cf.* Bradley & Goldsmith, *supra* note 30, at 834-36 (1997) (describing the Third Restatement's approach as without precedent and as doctrinal "bootstrapping").

37. 13 U.S. (9 Cranch) 388 (1815).

38. 18 U.S. (5 Wheat.) 153 (1820).

39. 175 U.S. 677 (1900).

40. *Tel-Oren*, 726 F.2d at 810 (Edwards, J., concurring).

41. *See infra* Part I.B.

42. *The Nereide*, 13 U.S. (9 Cranch) at 388-90.

43. *Id.* at 423.

44. *See generally* Kochan, *Constitutional Structure*, *supra* note 29.

45. *Smith*, 18 U.S. (5 Wheat.) at 153-55.

offenders shall, upon conviction thereof . . . be punished with death."[46] The jury returned a special verdict finding that Smith was involved in the plunder and robbery, and that if these actions constituted "piracy" under the 1819 Act (a question of law) he would be in violation of the act.[47] Addressing this legal question, Justice Joseph Story, writing for the Supreme Court, found that Smith's acts constituted piracy "as defined by the law of nations."[48]

To reach this conclusion, Justice Story considered whether the 1819 Act was constitutionally infirm, for the Constitution gives Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[49] The plaintiff argued "that Congress is bound to define, in terms, the offence of piracy, and is not at liberty to leave it to be ascertained by judicial interpretation."[50] Story found, however, the task assigned to the judiciary by Congress in the 1819 Act (which outlawed piracy) to be no different than finding the meaning of a word in any congressional command.[51] He determined that ascertaining the meaning of piracy was similar to other common law means of interpreting and applying a statute and its terms.[52]

Finding that Congress could allow the judiciary to determine the meaning of statutory terms by reference to the "law of nations," Story set forth the now oft-quoted method for ascertaining the "law of nations." Courts may ascertain the "law of nations" "by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law."[53] From examining a variety of sources in each category, Story concluded that Smith's actions fell within those universally treated as piracy in violation of the "law of nations."[54]

A similar approach to ascertaining the "law of nations" was adopted in *The Paquete Habana*.[55] The Paquete Habana was a fishing vessel sailing under the Spanish flag, captured off the coast of Cuba by a U.S. gunboat.[56] The vessel and her cargo were condemned as prizes of war and later sold at an auction.[57]

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46. *Id.* at 157.
47. *Id.* at 154-55.
48. *Id.* at 163.
49. U.S. CONST. art. I, § 8, cl. 10.
50. *Smith*, 18 U.S. (5 Wheat.) at 158.
51. *Id.* at 159.
52. *Id.* at 158-59. Although subsequent cases have relied on Justice Story's search of the common law through which he defined piracy, his holding could have been based on purely domestic and statutory law, making the determination of the law of nations merely dicta. Story argues that a 1790 Act of Congress, ch. 9, § 8, declared "that robbery and murder committed on the high seas shall be deemed piracy." *Id.* at 158. Relying on this statute alone, Story could have held that the jury's finding of "plunder and robbery" fit within the congressional definition of piracy. *Id.* Nonetheless, because Story was following Congress's command to find the meaning of piracy as "defined by the law of nations," he may have felt obliged to look beyond the 1790 act and actually ascertain how the law of nations defines piracy rather than rely on the previous declaration of Congress. *See Id.* at 160.
53. *Id.* at 160-61.
54. *Id.* at 161-63.
55. 175 U.S. at 700.
56. *Id.* at 678-79.
57. *Id.* at 679.

The owner and the master, on behalf of the other crew members who were entitled to shares of the Habana's catch, brought a suit challenging the seizure as unlawful.[58] The Supreme Court, in order to determine whether fishing vessels were legally subject to capture during the war with Spain, looked to the "law of nations" and found that "coast fishing vessels . . . have been recognized as exempt, with their cargoes and crews, from capture as prize of war."[59] After tracing a significant amount of history on the international treatment of fishing vessels as prizes of war to support the holding, the Court set forth perhaps the most relied upon statement relating to the scope of the justiciability of the "law of nations":

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[60]

This statement presents four key rules, at least under the circumstances of *The Paquete Habana* case.

First, it reaffirms the proposition that international law is part of the law of the United States, or at least its admiralty law. Second, it holds that a U.S. court may apply an international "law," as controlling authority, even when the "law" has not previously been recognized in a U.S. treaty, legislative act, executive act, or prior court decision. Third, the Court ratifies the *Smith* Court's method of consulting the works of jurists or commentators as a means for ascertaining an international "law." The Court cautions that only those works purporting to *report* the law rather than advocate for the acceptance of a principle should be consulted.[61] In support of its optimistic view that jurists can accomplish such a neutral task, the court cites Wheaton's assurance that jurists and commentators are "generally impartial in their judgment,"[62] a concept that is questionable if one looks at the actions and incentives of international law scholars today.

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58. *Id.*

59. *Id.* at 686.

60. *Id.* at 700 (citing Hilton v. Guyot, 159 U.S. 113, 163, 164, 214, 215 (1895)). A similar approach to defining international law is adopted by the Statute of the International Court of Justice, June 26, 1945, arts. 38 & 59, 59 Stat. 1055, 1060, 1062.

61. *The Paquete Habana*, 175 U.S. at 700-01.

62. *Id.* (citing WHEATON'S INTERNATIONAL LAW § 15 (8th ed., 1836)). *Cf.* C. Donald Johnson, Jr., Filartiga v. Pena-Irala*: A Contribution to the Development of Customary International Law by a Domestic Court*, 11 GA. J. INT'L & COMP. L. 335, 336-37 (1981) (arguing "[t]he difficulty of the task [of defining international law] is made more obvious by the wide variance among academic specialists in the field in approaching the sources of international law," and describing the "often nebulous law represented by the usage and practice of nations"); Mark P. Jacobsen, Comment, *28 U.S.C. §1350: A Legal Remedy for Torture in Paraguay?*, 69 GEO. L.J. 833, 834 (1981) (describing the "amorphous law of nations" and arguing that the application of the ATS is "restricted . . . by difficulty in defining when an act is governed by the law of nations").

Finally, in analyzing international legal sources concerning the "legality" of certain war practices, *The Paquete Habana* Court illustrated a willingness to give international law a dynamic perspective. In other words, it indicated that the "law of nations" cannot be analyzed from a static perspective and that certain standards ripen over time into settled rules of international law.[63] Nonetheless, the decision recognizes that a rule will not become a settled portion of international law unless it commands the "general assent of civilized nations."[64] This allegedly "stringent"[65] rule is justified, at least in form, as a means for ensuring that one nation will not "feel free to impose idiosyncratic legal rules upon others, in the name of applying international law."[66]

B. The Alien Tort Statute and the Application of the "Law of Nations"

1. Statutory Overview and the First Wave of Dormancy

The ATS, arising from a provision in the Judiciary Act of 1789, provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[67] This grant exists separately from both federal question[68] and diversity[69] jurisdiction, as well as from jurisdiction over admiralty, maritime and prize cases.[70]

Little direct evidence of Congress's intentions in enacting this provision exists to lend guidance to those searching for its meaning.[71] The Senate debates over the Judiciary Act were not recorded and the provision is never mentioned

63. *The Paquete Habana*, 175 U.S. at 694.

64. *Id.*

65. *Filartiga*, 630 F.2d at 881.

66. *Id.* The Filartiga court found that the situation would have been different had there not been a general assent of nations on the legal principle involved. *Id.* Similarly, in *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court refused to find an international law against a government's expropriation of a foreign-owned corporation's assets, for there was no general assent on the invalidity of such action. 376 U.S. 398 (1964); *see also* Josef Rohlik, Filartiga v. Pena-Irala*: International Justice in a Modern American Court?*, 11 GA. J. INT'L & COMP. L. 325, 330 (1981). But some commentators caution that the usage of a statute such as the ATS in any context may invite other, less friendly nations to assert similar jurisdiction over international law claims and impose obligations on foreign visitors that could lead to "chaotic or unjust results." *See, e.g.*, Farooq Hassan, Note, *A Conflict of Philosophies: The Filartiga Jurisprudence*, 32 INT'L & COMP. L.Q. 250, 257 (1983).

67. 28 U.S.C. § 1350 (2000). The original Act, enacted by the First Congress, read: "The district courts . . . shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 76-77.

68. 28 U.S.C. § 1331 (2000).

69. 28 U.S.C. § 1332 (2000). The original statute granting diversity jurisdiction did not equate "aliens" with "citizens." Thus, one might argue that the First Congress intended only to give aliens the same opportunity as citizens would receive under diversity jurisdiction, at least in relation to torts. *Tel-Oren*, 726 F.2d at 813-14 (Bork, J., concurring).

70. 28 U.S.C. § 1333 (2000).

71. Judge Friendly has described the Act as an "old but little used section" that is "a kind of legal Lohengrin; . . . no one seems to know whence it came." IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (holding fraud not a violation of international law).

in the debates of the House of Representatives.[72] Given that the ATS's passage immediately followed the ratification of the Constitution, however, the goals of the First Congress can be inferred from those portions of ratification debates relevant to the "law of nations."[73]

In the ATS's more than 210-year history, neither the Supreme Court nor Congress guided the judiciary in its application.[74] Prior to 1980, jurisdiction under the ATS was predicated successfully only two times.[75] Therefore, for almost 200 years, this Act remained essentially dormant.

Though *Smith* and *The Paquete Habana* did not involve cases brought under the ATS, the standards regarding the "law of nations" set forth in those cases have been found to be particularly relevant to the interpretation and application of the ATS. Most ATS cases require that courts ascertain which torts are cognizable when "committed in violation of the law of nations."[76]

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72. *See Tel-Oren*, 726 F.2d at 812 (Bork, J., concurring) (citing 1 Annals of Cong. 782-833 (J. Gales ed. 1789)).

73. *See generally* Kochan, *Constitutional Structure*, *supra* note 29.

74. *See* E. Hardy Smith, Note, *Federal Jurisdiction Under the Alien Tort Claims Act: Can This Antiquated Statute Fulfill Its Modern Role?*, 27 ARIZ. L. REV. 437, 438 (1985). For a discussion of Supreme Court cases that have addressed issues of international law, see generally Paul B. Stephen III, *International Law in the Supreme Court*, 1990 SUP. CT. REV. 133 (1990). There is some debate whether Congress has decided this issue by enacting the Torture Victim Protection Act. *Compare* Collingsworth, *supra* note 4, *with Al Odah*, 321 F.3d at 1145-49 (Randolph, J., concurring).

75. *See* Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961) (child custody dispute between two aliens; wrongful withholding of custody is a tort, and defendant's falsification of child's passport to procure custody violated the law of nations); Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607) (suit for restitution of three slaves who were on board a Spanish ship seized as a prize of war; treaty of France superseded the law of nations; § 1350 alternative basis of jurisdiction). Because a tort must be found to be the type which violates the law of nations before jurisdiction will be granted, some cases prior to 1980 considered application of the ATS, but found the alleged tort did not meet the law of nations threshold. *See* Huynh Thi Anh v. Levi, 586 F.2d 625, 629 (6th Cir. 1978) (no generally accepted international rule granting custody of children to grandparents); Benjamins v. British European Airways, 572 F.2d 913, 916 (2d Cir. 1978) (negligence law not part of the law of nations); *cf.* Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir. 1976) (wrongful confiscation of property not part of the law of nations); IIT v. Vencap, Ltd., 519 F.2d. 1001,1015 (2d Cir. 1975) (fraud not violative of international law); Abiodun v. Martin Oil Service, Inc. 475 F.2d 142, 145 (7th Cir. 1975) (fraud not violative of the law of nations); Khedivial Line, S.A.E. v. Seafarers' Int'l Union, 278 F.2d 49, 51-52 (2d Cir. 1960) (illegal picketing not in violation of international law); Valanga v. Metro. Life Ins. Co., 259 F. Supp. 324, 328 (E.D. Pa. 1966) (breach of contract not in violation of the law of nations); Damaskinos v. Societa Navigacion Interamericana, S.A., Panama, 255 F. Supp. 919, 923 (S.D.N.Y. 1966) (negligence law not part of the law of nations); Lopes v. Reederei Richard Schroder, 225 F. Supp. 292, 297 (E.D. Pa. 1963) (unseaworthiness doctrine not part of the law of nations).

76. *See infra* Parts I.B.2-6

2. The Second Wave and Beyond: Filartiga v. Pena-Irala

In *Filartiga v. Pena-Irala*,[77] decided in 1980, the Second Circuit resurrected the ATS from its fairly dormant existence.[78] Dolly Filartiga, a citizen of the Republic of Paraguay, sued Americo Norberto Pena-Irala, the former Inspector General of Police of Paraguay, for allegedly kidnapping, torturing, and killing her brother while in office.[79] Although the alleged actions took place in Paraguay,[80] Filartiga sued, while both Pena-Irala and she were in the United States on visitor's visas.[81] The district court dismissed the action for lack of subject matter jurisdiction.[82] The Second Circuit reversed and remanded, holding that deliberate torture by state officials violates international law and that alleging such torture creates jurisdiction under the ATS.[83] This decision breathed new life into this rather ancient statute.

The *Filartiga* court held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties."[84] For the first time, the ATS was applied in the modern human rights context. Furthermore, *Filartiga* established that "international law," used by the court as synonymous with the "law of nations," is an evolving concept to be ascertained by the courts.[85] The Second Circuit held that courts determining the "law of nations," must "interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[86]

In order to determine which principles control international "law," the court accepted the methodology prescribed in *Smith* and *The Paquete Habana*. It looked to general usages and customs of nations, as evidenced by the works of jurists and commentators, as well as treaties and declarations or resolutions of multinational bodies, such as the United Nations.[87] To that extent, the *Smith-*

77. 630 F.2d 876 (2d Cir. 1980). See Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After* Filartiga v. Pena-Irala, 22 HARV. INT'L L.J. 53 (1981) for a general discussion of the case and its approach. *See also* Hassan, *supra* note 66, at 255 (1983); Jacobsen, *supra* note 62, at 834; Johnson, *supra* note 62; Rohlik, *supra* note 66; Dean Rusk, *A Comment on* Filartiga v. Pena-Irala, 11 GA. J. INT'L & COMP. L. 311 (1981); Michael C. Small, Note, *Enforcing International Human Rights Law in Federal Courts: The Alien Tort Statute and the Separation of Powers*, 74 Geo. L.J. 163 (1985); Louis B. Sohn, *Torture as a Violation of the Law of Nations*, 11 GA. J. INT'L & COMP. L. 307 (1981); Gabriel M. Wilner, Filartiga v. Pena-Irala*: Comments on Sources of Human Rights Law and Means of Redress for Violations of Human Rights*, 11 GA. J. INT'L & COMP. L. 317 (1981).

78. Judge Robb of the U.S. Court of Appeals for the D.C. Circuit described the *Filartiga* approach as "judicially will[ing] that statute a new life." *Tel-Oren*, 726 F.2d at 827 (Robb, J., concurring).

79. *Filartiga*, 630 F.2d at 878.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 881.

86. *Id.*

87. *Id.* at 880-83.

Paquete Habana methodology was incorporated as precedent for the interpretation and application of the ATS.

3. *An Interruption: Tel-Oren v. Libyan Arab Republic*

Shortly after the Second Circuit's groundbreaking decision in *Filartiga*, the D.C. Circuit was faced with the similar task of applying the ATS in *Tel-Oren v. Libyan Arab Republic*.[88] Representatives of persons killed in a civilian bus in Israel, along with the injured survivors of the attack, sued the Libyan Arab Republic, the Palestine Liberation Organization, the Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America.[89] The plaintiffs charged the defendants with multiple tortious acts in violation of international law.[90]

The three judge panel of the D.C. Circuit, deciding the case unanimously, agreed that the court did not have jurisdiction over the plaintiffs' causes of action.[91] Each judge, however, wrote a separate concurring opinion, all positing a different basis for denying jurisdiction. Judge Edwards, adhering to the *Filartiga* rationale, argued that violations of the "law of nations" are a narrow category reserved to "a handful of heinous actions – each of which violates definable, universal and obligatory norms,"[92] and that the actions in this case did not trigger such jurisdiction.[93] Edwards cautioned, however, that when a proper cause of action satisfies the requirements of the ATS, the judiciary should exercise jurisdiction.[94]

Judge Robb relied primarily on the political question doctrine in his concurrence, asserting that an exercise of jurisdiction would improperly involve the judiciary in foreign affairs, an area outside of its expertise and one wrought with the danger of interference with the political branches.[95] Furthermore, Judge Robb rejected the *Filartiga* formulation for ascertaining international law under

88. 726 F.2d 774 (D.C. Cir. 1984) (per curiam). For a discussion of the case, see generally Debra A. Harvey, Comment, *The Alien Tort Statute: International Human Rights Watchdog or Simply "Historical Trivia"?*, 21 J. MARSHALL L. REV. 341, 349-52 (1988); Kenneth Marc Schneider, Note, *Hanoch Tel-Oren: The Retreat From Filartiga*, 4 CARDOZO L. REV. 665 (1983).

89. Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542, 544-45 (D.D.C. 1981). For a discussion of the district court opinion, see generally Eileen Rose Pollock, *Terrorism as a Tort in Violation of the Law of Nations*, 6 FORDHAM INT'L L.J. 236 (1982).

90. *Tel-Oren*, 517 F. Supp. at 544.

91. *Tel-Oren*, 726 F.2d at 775.

92. *Id.* at 781 (Edwards, J., concurring).

93. *Id.* at 775-98. *See also* Beanel v. Freeport-McMoran, Inc., 969 F. Supp. 362 (E.D. La. 1997) (accepting a broader scope of the law of nations, which included action by private individuals, but dismissing for failure to state a claim under the ATS upon which relief can be granted).

94. *Tel-Oren*, 726 F.2d at 789-91 (Edwards, J., concurring).

95. *Id.* at 823 (Robb, J., concurring).

the ATS[96] and, in the process, rejected the holding of *The Paquete Habana*.[97] Citing Chief Justice Fuller's dissent in *The Paquete Habana*,[98] Robb stated:

> Courts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations. Yet this appears to be the clear result if we allow plaintiffs the opportunity to proceed under § 1350. . . . The typical judge or jury would be swamped in citations to various distinguished journals of international legal studies, but would be left with little more than a numbing sense of how varied is the world of public international 'law.'[99]

Absent congressional guidelines to clarify the ATS's application or purpose, Judge Robb saw no opportunity for judicial cognizance under the statute.[100]

Judge Bork, also concurring in a separate opinion, found that the ATS merely provides a forum and does not provide a separate and automatic private cause of action for violations of international law.[101] Alternatively stated, even though international law may be part of the federal common law, it is not of the type, such as in torts or contracts, which allows judges to fashion a remedy. Instead it merely provides rules of decision.[102] Furthermore, Bork found no other statute or binding international law relied upon by the plaintiffs that conferred a right to a cause of action in the case.[103] According to Bork, courts, in light of principles of separation of powers, should be especially adamant against finding a cause of action where none is directly conferred.[104] Because there exists "sufficient controversy of a politically sensitive nature about the content of any relevant international legal principles" involved in the litigation, Bork felt it would be improper to adjudicate those claims.[105]

Finally, Judge Bork also expressed concern, in dicta, over the appropriate scope of international law in light of rules of statutory construction.[106] He argued that "one might suppose" that the meaning of "law of nations" in the ATS dealt with the three kinds of offenses understood to constitute the whole of international law at the founding: violation of safe conducts, infringement of the rights of ambassadors, and piracy.[107]

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96. *Id.* at 827 ("We ought not to cobble together for [the ATS] a modern mission on the vague idea that international law develops over the years. Law may evolve, but statutes ought not to mutate.").

97. *Id.* at 827.

98. 175 U.S. at 720 (Fuller, J., dissenting) (stating that it was "needless to review the speculations and repetitions of writers on international law. . . . Their lucubrations may be persuasive, but are not authoritative.").

99. *Tel-Oren*, 726 F.2d at 827 (Robb, J., concurring).

100. *Id.*

101. *Id.* at 799 (Bork, J., concurring).

102. *Id.* at 811.

103. *Id.* at 808-19.

104. *Id.* at 801-05.

105. *Id.* at 808. Judge Bork further stated, "Adjudication of those claims would require the analysis of international legal principles that are anything but clearly defined and that are the subject of controversy touching 'sharply on national nerves'." *Id.* at 805 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1963)).

106. *Id.* at 813.

107. *Id.* at 813-14 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *68, 72, *quoted in* 1 W.W. CROSSKEY, POLITICS AND CONSTITUTION IN THE HISTORY OF THE UNITED STATES 459 (1953)).

4. The Third Wave: Kadic v. Karadzic

Despite an arguably brief judicial retreat from the *Filartiga* rationale evidenced in *Tel-Oren*, the expansion of the judicial application of the ATS reached a new level in 1995 with the *Kadic v. Karadzic* decision.[108] The plaintiffs in *Kadic* were Croat and Muslim citizens of Bosnia-Herzegovina.[109] They alleged that they were victims, and representatives of victims, of various atrocities including rape, torture, and summary executions by the Bosnian-Serb military forces.[110] The suit was brought against Karadzic in his capacity as the President of the Bosnian-Serb faction, and he was served while at the United Nations in New York.[111] The district court dismissed the case for lack of subject-matter jurisdiction.[112] The Second Circuit reversed this ruling,[113] and as a consequence, greatly expanded the jurisdiction conferred by the ATS—at least within the Second Circuit.[114]

The Second Circuit held that the ATS applies to actions by state actors or private individuals that are in violation of customary international law.[115] According to the *Kadic* court, state action is not necessary for a cognizable violation of the "law of nations" to exist.[116] The court accepted the principles it had adopted earlier in *Filartiga*, noting that international law is constantly evolving, and consulting a similar list of authorities to ascertain the norms of contemporary international law.[117] As a result, the court relied upon various international conventions, declarations, and resolutions to determine that the acts alleged—including genocide, torture, and rape—constituted violations of generally accepted norms of international law.[118]

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108. 70 F.3d 232 (2d Cir. 1995), *reh'g denied*, 74 F.3d 377 (2d Cir. 1996). Judge Newman highlighted the peculiar nature of the case in his opinion: "Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan." *Id.* at 236. A number of case notes and articles have been published on the *Kadic* opinion. *See, e.g.*, Judith Hippler Bello et al., *International Decision*, 90 AM. J. INT'L L. 658 (1996); David S. Bloch, *Dangers of Righteousness: Unintended Consequences of* Kadic v. Karadzic, 4 TULSA J. COMP. & INT'L L. 35, 47 (1996) (arguing that, while international law litigation in U.S. courts is generally good, Kadic itself "muddies international law, weakens American diplomacy and strengthens the very outlaws it is intended to attack"); Pamala Brondos, Note, *International Law—The Use of the Torture Victim Protection Act as an Enforcement Mechanism*, 32 LAND & WATER L. REV. 221 (1997); Amy E. Eckert, Note, Kadic v. Karadzic*: Whose International Law?*, 25 DENV. J. INT'L L. & POL'Y 173 (1996) (concluding *Kadic* went too far); Alan Frederick Enslen, Note, Filartiga*'s Offspring: The Second Circuit Significantly Expands the Scope of the Alien Tort Claims Act with Its Decision in* Kadic v. Karadzic, 48 ALA. L. REV. 695 (1997); Justin Lu, Note, *Jurisdiction over Non-State Activity Under the Alien Tort Claims Act*, 35 COLUM. J. TRANSNAT'L L. 531 (1997).

109. *Kadic*, 70 F.3d at 236.

110. *Id.* at 236-37.

111. *Id.* at 237.

112. *Id.*

113. *Id.* at 251.

114. *See* Charles F. Marshall, *Re-framing the Alien Tort Act After* Kadic v. Karadzic, 21 N.C. J. INT'L L. & COM. REG. 591, 597 (1996).

115. *Kadic*, 70 F.3d at 239.

116. *Id.*

117. *Id.* at 238-39.

118. *Id.* at 241-44.

5. Selected Post-Kadic Applications of the ATS

In 1996, two circuit courts were faced with applying the ATS. In *Abebe-Jira v. Negewo*, the U.S. Court of Appeals for the Eleventh Circuit affirmed a decision awarding compensatory and punitive damages for "torture and cruel, inhumane, and degrading treatment, pursuant to the Alien Tort Claims Act."[119] Negewo served as chairman of Higher Zone 9, one of twenty-five governing units created by the Dergue dictatorship, which divided Ethiopia's capital.[120] The plaintiffs suffered various atrocities, including torture and beatings during interrogations, at the hands of Higher Zone 9 guards. The district court found that Negewo personally supervised or participated directly in at least some of the interrogations.[121]

The Eleventh Circuit determined that the ATS "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law."[122] Finding that the political question doctrine only prevents the courts from deciding issues "textually committed to the legislative or executive branches,"[123] the court determined that it could take cognizance of the tort action at bar.[124]

The Ninth Circuit revisited its application of the ATS[125] in 1996 with two separate decisions (from appeals addressing different issues) in the case of *Hilao v. Estate of Ferdinand Marcos*.[126] Opponents of the Marcos regime in the Philippines sued for violations of their human rights, alleging they were victims of torture. The jury found that the plaintiffs and the victims they represented were subjected to a range of tortures under the authority of Marcos, including summary execution, arbitrary detention and other atrocities during interrogations, some of which were conducted by Marcos himself.[127]

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119. 72 F.3d 844, 845 (11th Cir. 1996).

120. *Id.*

121. *Id.* at 845-46.

122. *Id.* at 848.

123. *Id.*

124. *Id.* (citing Linder v. Portocarrero, 963 F.2d 332, 337 (11th Cir. 1992) (holding that the "political question doctrine did not bar a tort action instituted against Nicaraguan contra leaders").

125. *See* Trajano v. Marcos (*In re* Estate of Ferdinand E. Marcos Human Rights Litigation), 978 F.2d 493, 501-03 (9th Cir. 1992) [hereinafter *Estate I*]; Hilao v. Marcos (*In re* Estate of Ferdinand E. Marcos Human Rights Litigation), 25 F.3d 1467, 1472-74 (9th Cir. 1994) [hereinafter *Estate II*]. For a discussion of *Trajano v. Marcos*, see Sung Teak Kim, Note, *Adjudicating Violations of International Law: Defining the Scope of Jurisdiction Under the Alien Tort Statute*—Trajano v. Marcos, 27 CORNELL INT'L L.J. 387 (1994).

126. 103 F.3d 767 (9th Cir. 1996) [hereinafter *Estate III*]; 103 F.3d 789 (9th Cir. 1996) [hereinafter *Estate IV*]; *see also* Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997) (upholding subject matter jurisdiction under ATS based on allegations that an American oil company, acting in concert with the Burmese government, committed various civil and human rights abuses), *aff'd in part & rev'd in part*, Nos. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), *reh'g en banc granted, opinion vacated by* Nos. 00-56603, 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003).

127. *See In re* Estate of Ferdinand E. Marcos Human Rights Litigation, 910 F. Supp. 1460, 1462-63 (D. Haw. 1995).

Applying its earlier test that "[a]ctionable violations of international law [under § 1350] must be of a norm that is specific, universal, and obligatory,"[128] the Ninth Circuit found that the international norm against torture and arbitrary detention was sufficiently specific to be actionable under the ATS.[129] Applying the *Paquete Habana* methodology[130] to determine the content of international law, the court drew from the following international documents: the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the American Convention on Human Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms; and the African Charter on Human and Peoples' Rights.[131]

While the use of international law in judicial decision-making is not new, these cases illustrate the increasing presence in the jurisprudence of American courts of tort liability for customary international law violations through application of the ATS. The cases generally followed a continuously expanding wave trend: the first was disuse and dormancy; the second was the acceptance of liability under the ATS for official state acts, including its recognition of the statute as providing for both jurisdiction and a cause of action and evidencing liability by noncompliance with customary international law outputs; and the third was the movement toward an acceptance that quasi-state and private individuals could be liable for violations of customary international law. The fourth wave in ATS jurisprudence, discussed in the next subsection, involves suits against private individuals and corporations.

6. *The Fourth Wave: Suits Against Private Individuals and Corporations*

Throughout the 1980s and early 1990s, several suits were brought against multinational corporations for alleged violations of customary international law. These suits were largely unsuccessful. However, a major turning point occurred in 1997 when a federal district court in California issued its decision in the case of *John Doe v. Unocal Corp.* This decision upheld subject matter jurisdiction under the ATS based on allegations that an American oil company, acting in concert with the Myanmar government, committed various civil and human rights abuses.[132]

As previously discussed, that case was most recently analyzed in a 2002 opinion by the Ninth Circuit, when the circuit court reversed in part a decision by the district court to grant a motion for summary judgment in favor of Uno-

128. *Estate IV*, 103 F.3d at 794 (citing *Estate II*, 25 F.3d at 1475).

129. *Id.*

130. *Id.* at 794-95 (citing Siderman de Blake v. Republic of Arg., 965 F.2d 699, 715 (9th Cir. 1992) (quoting *The Paquete Habana*, 175 U.S. at 700)).

131. *Id.*

132. 963 F.Supp. 880 (C.D. Cal. 1997), *aff'd in part & rev'd in part*, Nos. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), *reh'g en banc granted, opinion vacated by* Nos. 00-56603, 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003).

cal.[133] There, the circuit court held that sufficient evidence existed to support the plaintiffs—accusing Unocal of aiding and abetting forced labor, murder, rape, and torture, committed by the Myanmar government—to allow the case to proceed to trial.[134] The court again took a broad view of international law, citing many customary international law outputs to which the United States is not a party or for which the United States has adopted no implementing legislation.[135] Moreover, the court saw the application of international law as superior to state, federal, and foreign law. It reasoned that international law was a *preferable* law of first application:

> Application of international law—rather than the law of Myanmar, California state law, or our federal common law—is also favored by a consideration of the factors listed in the Restatement (Second) of Conflict of Laws § 6 (1969). First, "the needs of the . . . international system" are better served by applying international rather than national law. Second, "the relevant policies of the forum" cannot be ascertained by referring—as the concurrence does—to one out-of-circuit decision which happens to favor federal common law and ignoring other decisions which have favored other law, including international law. Third, regarding "the protection of justified expectations," the "certainty, predictability and uniformity of result," and the "ease in the determination and application of the law to be applied," we note that the standard we adopt today from an admittedly recent case nevertheless goes back at least to the Nuremberg trials and is similar to that of the Restatement (Second) of Torts. *Finally, "the basic polic[y] underlying the particular field of law" is to provide tort remedies for violations of international law. This goal is furthered by the application of international law, even when the international law in question is criminal law but is similar to domestic tort law* . . . .[136]

The court's holding seems a sweeping validation of the ATS's reach.

Since the original 1997 *Unocal* decision, dozens of new lawsuits against private corporations have been filed.[137] Among these, for a wide range of alleged wrongs and in a wide range of countries, were cases brought against Nike, Shell, Texaco, Rio Tinto, The Gap, Total, Pfizer, BHP, Coca-Cola, Siemens, Drummond Coal, Del Monte, ExxonMobil, Abercrombie & Fitch, Target, J.C. Penney Co., Levi Strauss, Dole, and Chevron, to name a few.[138] Some of these cases involve vicarious liability theories, still others involve corporate responsibility for direct actions under customary international law. Hopes for large judgments or high settlements fuel much of this litigation, and have caused NGOs to team with the plaintiffs' bar in an effort to fortify a new front against multinational operations. Although some of these lawsuits are ongoing, some have already resulted in substantial settlements.[139] A broad range of suits have

133. *See Doe*, 2002 WL 31063976 at *24, *opinion vacated, reh'g en banc granted by* Nos. 00-56603, 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003).

134. *Id.* at *24.

135. *Id.* at *11-13.

136. *Id.* at *11 (emphasis added) (citations omitted).

137. *See, e.g.*, Vosper, *supra* note 10.

138. *Id.*

139. *Id.*

also been filed against state actors in the past few years.[140] Selected cases are discussed below.

The Second Circuit in one such case, *Wiwa v. Royal Dutch Petroleum Co.*, originally filed in 1999, allowed a suit to proceed against Shell.[141] The complaint alleged that the plaintiffs' relatives were imprisoned, tortured, and killed by the Nigerian government, that Shell caused air and water pollution, that Shell essentially expropriated land, and that Nigeria committed various other crimes with Shell's assistance. The court explained:

> According to the complaint, while these abuses were carried out by the Nigerian government and military, they were instigated, orchestrated, planned, and facilitated by Shell Nigeria under the direction of the defendants. The Royal Dutch/Shell Group allegedly provided money, weapons, and logistical support to the Nigerian military, including the vehicles and ammunition used in the raids on the villages, procured at least some of these attacks, participated in the fabrication of murder charges against Saro-Wiwa and Kpuinen, and bribed witnesses to give false testimony against them.[142]

The Second Circuit rejected Shell's forum non convienens argument. According to that court, Congress, through the ATS and other action, not only "permit[s] U.S. District Courts to entertain suits alleging violation of the law of nations, [but also] *expresses a policy favoring receptivity by our courts to such suits*."[143] As of this writing, this case proceeds in the discovery phase.[144]

Another case of interest is *Sarei v. Rio Tinto*.[145] There, the plaintiffs alleged environmental and other torts, including altering the climate of the Papua New Guinean island of Bougainville. Plaintiffs claimed a violation of their right to a sustainable environment, racial discrimination, and cultural genocide:

> Rio Tinto needed the cooperation and assistance of [Papua New Guinea's (PNG's)] government to [construct a mine], because constructing the mine necessitated displacing villages and destroying massive portions of the rain forest. To obtain the required assistance, Rio Tinto allegedly offered the government 19.1% of the mine's profits. PNG accepted, and plaintiffs allege that thereafter, the mine became "a major source of income for PNG and provided [an] incentive for the PNG government to overlook any environmental damage or other atrocities Rio committed." They also assert that "[t]he financial stake of the PNG government effectively turned the copper mine into a joint venture between PNG and Rio [Tinto] and allowed Rio [Tinto] to operate under color of state law."[146]

The court took a broad reading of the ATS, although it ultimately dismissed the claims based on the political question doctrine.[147] Nonetheless, it is important that the court concluded that the plaintiffs' allegations had been sufficient to state a claim by relying on many different customary international law outputs,

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140. *Id.*
141. 226 F.3d 88 (2d Cir. 2000).
142. *Id.* at 92-93.
143. *Id.* at 105 (emphasis added).
144. *See, e.g., Shell execs face questioning in Nigeria lawsuit*, ENERGY COMPASS, Jan. 24, 2003.
145. 221 F. Supp. 2d 1116 (C.D. Cal. 2002).
146. *Id.* at 1121.
147. *Id.* at 1208-09. *See infra* notes 94-107 and accompanying text.

including many never formally adopted by the United States and many that were highly aspirational in substance.[148]

Additional suits will undoubtedly be filed in this fourth wave of ATS jurisprudence. It appears that the liability trajectory will, without judicial check, undoubtedly move upward.

II.
THE INCREASING ROLE OF NGOS IN THE PRODUCTION OF CUSTOMARY INTERNATIONAL LAW OUTPUTS AND ITS IMPLICATIONS

As ATS jurisdiction grows and courts increasingly express a willingness to consult customary international law outputs regardless of whether they are adopted or recognized by the United States in order to enforce "customary international law," NGOs will undoubtedly have greater incentive to invest in the production of customary international law outputs that are tailored and favorable to their interests. Similar to the proposition that the drafters of the ALI's Restatements of Law are not indeed "restating" the existence of law but instead advancing an agenda of what law they would like to see exist,[149] NGOs have an incentive to gear customary international law output content not to universally accepted principles of nations, but rather to their own special interests clothed in principles so as to seem "universally accepted."

If successful in that process, a law and economics perspective would predict that NGOs will see an increased value in such customary international law outputs, for they can be advanced as enforceable documents in court. In other words, judicial recognition of customary international law outputs substantially changes the nature of demand and supply for these outputs. This part examines this contention, through the application of public choice theory.

The incentives for NGOs to engage in rent-seeking behavior at the international level should be substantially advanced if the products/outputs of the rent-seeking gain value by recognition as legitimate evidence of "law" in liability litigation in the courts. Some recent articles have examined NGOs in an interest group perspective, explaining that we should expect NGOs to react to institutional changes.

James Sheehan posits that NGOs are a major force in the development of international law:

> Welcome to the brave new world of the NGO, where full-time activists attend international treaty-making proceedings as UN-accredited representatives of the public . . . . Besides participating in UN-sponsored treaty negotiations, NGOs are involved in a wide range of activities. They design and propose texts for international treaties, conventions, and other international law instruments . . . . Their

148. *Id. See also infra* Part II.C.

149. *See, e.g.,* Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEG. STUD. 131 (1996); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995).

> attorneys file suit in U.S. and foreign courts against public and private bodies they consider out of compliance with law . . . .[150]

Moreover, NGOs react just like other profit-maximizing players in the public choice process of developing customary international law outputs:

> NGOs have a political ideology. Most believe that the private sector cannot solve environmental problems and that governments must control economic decision-making to protect the environment. This belief may be quite sincere, but it is also rooted in self-interest. Many NGOs depend on governments for jobs, money and power. They seek out grants and contracts from national governments and international agencies. They also bask in the recognition they receive from public agencies, which adds authority to their pronouncements and brings their leaders prestige.[151]

Success in litigation, or the extraction of settlements due to the threat of legal liability, is a valuable tool to further their contributions, and is, as a result, useful to an NGO's influence and power. Due to the increased funding, influence and power, even more can be invested in the production of customary international law outputs from which NGOs can reap additional benefits, including new litigation and settlements.

In fact, the United Nations accords preferential status to NGOs. For example, the UN Department of Public Information explains the following system by which over 1500 NGOs are given an identifiable "associated" role in the production of international law:

> A non-governmental organization is any non-profit, voluntary citizens' group which is organized on a local, national or international level. Task-oriented and driven by people with a common interest, NGOs . . . provide analysis and expertise, serve as early warning mechanisms and help monitor and implement international agreements. Some are organized around specific issues, such as human rights, the environment or health. Their relationship with offices and agencies of the United Nations System differs depending on their goals, their venue and their mandate.[152]

Some scholars have documented that the system is skewed toward providing access and resources to NGOs, thus favoring an expansive view of international law and the role of customary international law outputs.[153]

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150. JAMES SHEEHAN, GLOBAL GREENS 1 (1998). *See also* JEREMY RABKIN AND JAMES SHEEHAN, GLOBAL GREENS, GLOBAL GOVERNANCE (1999); Sanford E. Gaines, *Global and Regional Perspectives on International Environmental Protection*, 19 HOUS. J. INT'L L. 983, 1000-03 (1997) (detailing the substantial role played by NGOs in the formation and structure of the North American Free Trade Agreement, Commission on Environmental Cooperation, and the North American Agreement on Environmental Cooperation).

151. SHEEHAN, *supra* note 150, at 2.

152. *See* Department of Public Information, Non-Governmental Organizations Section, *at* http://www.ngo.org/dpi/ngosection/brochure.htm (describing applications for DPI associate status) (last visited Oct. 21, 2003).

153. *See generally* Christopher Horner, *Modern Developments in the Treaty Process: Recent Developments Regarding Advice and Consent, Withdrawal, and the Growing Role of Nongovernmental Organizations in International Agreements With Particular Examination of the 1997 Kyoto Protocol*, The Federalist Society for Law and Public Policy Studies, *at* http://www.fed-soc.org/Intl law&%20AmerSov/Treatypaper.pdf (citing, among others, a report on bias in the selection process, regarding the 2002 U.N Child Summit (UNICEF)) (last visited Oct. 21, 2003).

NGOs, like other entities, act as interest groups focused on maximizing private benefits. In seeking the production of customary international law outputs for use in future litigation, NGOs will not necessarily be seeking specific outcomes from each output; but rather, these outputs can result in the production of tools for use in other forums. Once customary international law outputs become enforceable to establish tort liability, a fundamental transformation in the nature of the output will occur. This is especially true of customary international law outputs produced prior to enforceability when all parties involved are unaware of the true consequences of the production.

Zywicki examined environmental NGOs and concluded that we should expect their behaviors to be motivated by self-interest and maximization of private benefits:

> It does, in fact, seem obvious that the primary motivation for leaders and contributors to environmental interest groups is to provide *private* benefits for themselves, rather than public benefits. In this, they truly are just like any other interest group. It is the rare interest group that exists simply to provide undifferentiated public goods . . . .[154]

One identifiable motivation for environmental NGOs seeking "results" is to sell the outcomes of their lobbying efforts to their members and attempt to bolster budgets and self-perpetuate. In addition, environmental interest groups are in competition with development organizations.

However, the ultimate competition, in terms of production of customary international law outputs, or opposition thereto, is unbalanced. By obtaining regulation through direct governmental controls or through customary international law outputs, which could be used in litigation for greater protection of environmental values, environmental NGOs are able to escape the need to engage in market transactions with development interests for such environmental protection.

> Environmentalists often claim that environmental activist groups and environmental regulation is [sic] animated by the "public interest," i.e., an outpouring of "civic republicanism" that causes individuals to overcome their narrow self-interest and to support wide-ranging environmental regulatory policies. Moreover, it is usually added that this spirit of public interest is usually effectuated through a process of public, deliberative democracy, where all parties debate in order to reach consensus about the ideal public policy that advances the common good rather than private gain.[155]

Therefore, the rent created may indeed be based on the values of time, money and other market goods—using regulation to escape the need to engage in market transactions for the trading of environmental goods. Whichever way one looks at the self-interest served by NGO investment in regulation, environmental NGOs gain particular benefit from products like customary international law outputs and litigation victories or settlement extractions resulting from the enforceability of such outputs.

154. Zywicki, *supra* note 33, at 22.
155. *Id.* at 10.

There are several reasons why NGOs may prefer to invest in customary international law outputs, *particularly* if they are enforceable laws or evidence of laws that can help establish tort liability to advance the interests of the organization. This Part examines the incentives for, and influences of, NGOs in the customary international law output production process. It concludes that, from a public choice perspective, most customary international law outputs should not serve as evidence of judicially enforceable legal obligations.

The examination focuses largely on the supply and demand for the production of customary international law outputs, arguing that enforceability of these outputs in U.S. courts will increase their production in the short run. The thesis is that non-enforceability of customary international law outputs used to be a significant demand constraint on production. However, increasingly this constraint is weakening as more and more U.S. courts recognize customary international law outputs as enforceable. At the same time, there has not been a corresponding increase in supply constraints.

To examine this thesis, I consider the following selected issues of supply and demand:

PRODUCTION OF CUSTOMARY INTERNATIONAL LAW OUTPUTS (CILOS)

SUPPLY CONSTRAINTS

— Competition/Diffuse Interests
— General Jurisdiction versus Single Purpose
— Transaction Costs Associated with Production including specificity of outputs
— Risks to Producers/Decision Makers & Their Constituents including issues of Reciprocity & Voluntary Assent

DEMAND CONSTRAINTS

— Cost/Price of Investment
— Level of Competition
— Non-Enforceability
— Steps Requiring Additional Decisions, such as Domestic Execution/Implementation
— Level of Benefit/Value

I discuss several issues below to analyze these constraints on production and the effect of recent ATS trends on the constraints. The primary focus of this Part is on the demand side—that is of the motivation behind seekers of customary international law outputs. However, I will also discuss the reasons why the supply side constraints will be difficult to tighten in order to balance the increase in demand caused primarily by an increase in the enforceability of customary international law outputs.

Stephan has examined the political economy of international lawmaking—predominantly the creation of international trade and private international law, with an analysis focusing "primarily on the supply side of international law, which is to say the factors that motivate the producers of this good."[156] More-

156. Stephan, *Accountability, supra* note 32, at 694.

over, his limited demand analysis focuses on issues of reciprocity and cooperation,[157] conditions that I will later show do not hold strongly in the context of NGO use in ATS litigation. Nonetheless, he recognizes that "any analysis of the demand for international law must account for rent-seeking by interest groups."[158] Moreover, his work demonstrates that different producing organs of government—the representatives of executive branches, national parliaments, private legislators, and international adjudicators—are willing to work with interest groups in varying degrees to increase the supply of a desired international rule in order to serve discrete and powerful interest groups, even when it may be to the detriment of the overall welfare of their country.[159]

A. Avoidance of Domestic Procedural Lawmaking Hurdles

Many of the documents relied on by courts to identify customary international law and used by NGOs to attempt to establish liability, have not been acknowledged as binding, let alone passed as law by Congress. As James Madison articulated, "[N]o foreign law should be a standard farther than is expressly adopted."[160] If an NGO need not prove the assent of Congress in order to establish the enforceability of a customary international law output, it can, in turn, avoid the costs of adopting such legislation. For this article's purposes, I will focus on the NGO avoidance of lawmaking in the United States, and, therefore, their circumvention of a process which requires bicameralism and presentment.

Taking the two Second Circuit decisions, *Filartiga*[161] and *Kadic*,[162] as illustrations, each court looked to various international declarations and resolutions, including the Universal Declaration on Human Rights, to interpret the scope of the "law of nations" under the ATS. Such references create two problems. First, Congress has never ratified many of the sources relied on, or at least partially relied on, to determine a controlling rule of international law. Worse yet, Congress considered these declarations and resolutions and specifically chose not to accept them as binding authority on its own (or its constituents') actions. This poses serious questions about the legitimacy of their use as sources of law. In *Filartiga*,

157. *Id.*

158. *Id.* at 694. Stephan states:

> When discussing the demand for domestic rules, a conventional analysis incorporates the insights of public choice theory. This body of thought specifies the conditions under which cohesive minorities may obtain laws for their discrete benefit to the detriment of unorganized majorities. Similarly, any analysis of the demand for international law must account for rent-seeking by interest groups. . . .[I]n some instances interest groups may induce countries to engage in international lawmaking that disserves the populations of the nations promoting the legislation. The illumination of the conditions under which such outcomes occur is one of the central tasks of public choice theory.

Id. at 694-95.

159. *Id.* at 695-706.

160. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 316 (Farrand ed., 1986).

161. Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980).

162. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

> [T]he Second Circuit alluded to certain international treaties on human rights, including the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The first two of these were among the four treaties on human rights submitted by President Carter to the Senate for its advice and consent in 1978 [and the United States was not involved in the third]. *Neither in the court's opinion nor in the* amicus *brief filed in the* Filartiga *case jointly by the Departments of Justice and State, was reference made to the reservations, declarations, understandings, and statements that President Carter recommended that the Senate include in its resolution of advice and consent.* The effect of these qualifications of the two treaties would be to render them non-self-executing for the United States, requiring implementing legislation to become effective as law in the United States.[163]

The *Filartiga* court did not discuss or recognize Congress's failure to ratify these documents or the affirmative and explicit concerns both voiced by Congress and the President in relation to the content of these documents. Yet it seems clear, especially in light of Congress's power to define offenses against the "law of nations," that these sentiments should restrict the courts' reliance upon such documents as an authoritative statement of the law.[164]

Take also the example of the Ninth Circuit in *Martinez v. City of Los Angeles,* where the court addressed a suit brought by an alien against the City of Los Angeles for actions that occurred in Mexico in alleged violation of "customary international law."[165] The Ninth Circuit sustained the suit, in part deriving applicable "customary international law" from the International Covenant on Civil and Political Rights.[166] However, as Judge Randolph recently critiqued in *Al Odah*, "the court neglected to mention that this multilateral agreement creates no judicially enforceable rights and that the Senate ratified the treaty on the basis that it 'will not create a private cause of action in U.S. courts.'"[167]

These examples are not isolated. ATS cases are replete with references to customary international law outputs to which no congressional assent has been made.[168] No laws have been passed to ratify or execute many of these outputs. Congress's actions on the International Covenant on Civil and Political

163. Rusk, *supra* note 77, at 315 (emphasis added) (citations omitted). Hassan provides a similar conclusion:

> [T]he President also inserted various reservations, declarations and understatings [sic], thereby further decreasing the efficacy of those treaties [including the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; and the American Convention on Human Rights] . . . when eventually those treaties are ratified by the USA.

Hassan, *supra* note 66, at 255 (1983) (also adding that the Genocide Convention, submitted to the Senate in 1948, has still not been ratified).

164. *See* Jacobsen, *supra* note 62, at 834, 849 (arguing that, "[t]he Filartiga court should have been sensitive to the Senate's deliberate inaction and refrained from creating a new rule of international law . . . . [T]he court might have effectively curtailed the Senate's ability to set policy in the area of human rights.").

165. 141 F.3d 1373 (9th Cir. 1998).

166. *Id.* at 1383-84.

167. Al Odah v. United States, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J., concurring) (citing S. EXEC. REP. NO. 102-23, at 9, 19, 23 (1992)).

168. *Id.*

Rights,[169] the American Convention on Human Rights, or on the Universal Declaration of Human Rights are not isolated situations. In fact, Congress has failed to ratify the vast majority of human rights treaties sponsored by the United Nations.[170] This record indicates a general unwillingness on the part of the United States to recognize broad principles of human rights as controlling legal authority.[171]

Several federal courts that have faced this issue indicated a willingness to look beyond congressional action when determining whether certain customary international law outputs evidence an enforceable tort standard under customary international law.[172] As one court explained its position: "The United States signed the [Convention on the Rights of the Child] on February 16, 1995; it has never been sent to the Senate for ratification. . . . The CRC does not have the force of domestic law under the treaty clause of the Constitution. *Non-ratification does not, however, eliminate its impact on American law.*"[173] Similarly, in *Sarei v. Rio Tinto*, the court held that rights recognized in the UN Convention on

169. The International Covenant on Civil and Political Rights awaited Senate action since 1978, eventually entering into force for the United States in late 1992 with five reservations, five understandings, four declarations, and one proviso. *See generally* John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59 (1993).

170. Jacobsen, *supra* note 62, at 847-48 ("[T]he Senate has been unwilling to extend international law to encompass the protection of human rights.").

171. *See id.* at 849. Jacobsen states:

> The Senate has refrained thus far from ratifying . . . numerous . . . human rights treaties, thereby expressing an unwillingness to create any internationally recognized legal protections for human rights. The Senate's primary concern has been that the treaty provisions might intrude upon the sovereignty of nations and of the United States in particular.

Id.; *see also* Bradley & Goldsmith, *supra* note 30, at 869 (1997) (stating that, "[f]ar from authorizing the application of the new CIL [customary international law] as domestic federal law, the political branches have made clear that they do not want the new CIL to have domestic law status.").

172. *See, e.g.*, U.S. v. Schiffer, 836 F. Supp. 1164, 1171 (E.D. Pa. 1993) (courts may consider signed but not ratified customary international law outputs as evidence of customary international law). Consider also the statement in *Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002):

> A treaty has been sometimes said to have force of law only if ratified. Courts, however, often use non-ratified treaties as aids in statutory construction. A number of these cases have been catalogued by Professor Steinhardt, who lists:
> Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981) (citing the American Convention on Human Rights and the Universal Declaration of Human Rights as support for customary principle prohibiting prolonged arbitrary detention); Filartiga v. Pena-Irala, 630 F.2d 876, 883-85 (2d Cir. 1980) (consulting the American Convention on Human Rights and the International Covenant on Civil and Political Rights, *inter alia*, to determine the customary prohibition on torture); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987) (recognizing the Universal Declaration, American Convention, and the Civil and Political Covenant as evidence of a customary norm against summary execution), *reh'g granted in part and denied in part*, 694 F. Supp. 707 (N.D. Cal. 1988); Lareau v. Manson, 507 F. Supp. 1177, 1187-89 n.9 (D. Conn. 1980) (discussing the United Nations Minimum Standard Rules Governing the Treatment of Prisoners), *modified*, 651 F. 2d 96 (2d Cir. 1981), *aff'd in part and modified in part*, 651 F. 2d 96 (2d Cir. 1981).

183 F. Supp. 2d at 593 (citing Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1182 n. 332 (1990).)

173. *Id.* at 596 (emphasis added).

the Law of the Sea could be recognized in federal courts even though it has only been signed, not ratified, by the United States.[174]

By ignoring Congress's role in law creation and insisting that these documents form a foundation for ascertaining the "law of nations" component of the ATS, the U.S. courts harm Congress. As Judge Randolph stated in *Al Odah*, "Nothing in the Constitution expressly authorizes such free-wheeling judicial power."[175]

First of all, court acceptance of certain customary international law outputs as enforceable instruments ignores Congress's power and prerogative to refrain from codifying certain principles or norms into U.S. law. Second, it restricts congressional power to legislate in a manner contrary to these principles or norms. By proclaiming that certain principles or norms are universal and binding upon all states (or, in the case of *Kadic*, all states and some individuals), the court states that an obligation specifically not accepted by Congress will now bind the United States and its Congress. Through the production of customary international law outputs and its judicial enforceability, NGOs can not only subvert bicameralism and presentment for the creation of federal tort law, but they might also achieve something perhaps more valuable—a declaration by a United States court of a universal law binding on all nations, including the United States, without surviving the rigors of a constitutional amendment.

Inherent in Congress's power to legislate is the authority to choose not to legislate. When a court decides to look beyond Congress for controlling regulations or for controlling definitions of "law", it may be usurping Congress's power to refrain from regulating or defining.[176] Stated another way, the court creates a regulation or definition absent congressional intent or assent to regulate or create a controlling rule of law.[177]

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174. 221 F. Supp. 2d 1116, 1161-62 (C.D. Cal. 2002); *see also* Mayaguezanos por la Salud y el Ambiente v. United States, 38 F. Supp. 2d 168, 175 n.3 (D.P.R. 1999) ("The Senate has yet to ratify UNCLOS III. However, pending ratification or rejection by the Senate, 'the United States is bound to uphold the purpose and principles of the agreement to which the executive branch has tentatively made the United States a party.'").

175. *Al Odah*, 321 F.3d at 1148 (Randolph, J., concurring).

176. *See* Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1268 (1988) [hereinafter Weisburd, *The Executive Branch*]; Arthur M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 38-44 (1995). Weisburd argues:

> Holding that the Executive is constrained by international law . . . would shift power from the elected President to the unelected courts. . . [and] could leave the United States bound by policy choices in which no element of the American government actively participated. This result could occur because the United States can easily be held to be bound by a rule of customary international law to which it did not object during the process of its formation, even if it did not actively participate in advancing the rule.

Id. (citing Waldock, *General Course on Public International Law*, 106 RECUEIL DES COURS 1, 50 (1962)).

177. Weisburd, *The Executive Branch*, *supra* note 176, at 1255-56; *see also* Bradley & Goldsmith, *supra* note 30, at 844-47 (arguing that declarations that the law of nations is part of the laws of the United States might create executive obligations under the "Take Care" clause in Article II of the Constitution and might also raise federalism concerns through obligations placed on the states through the Supremacy Clause in Article VI of the U.S. Constitution).

More importantly, however, for purposes of an economic analysis, the ability to cut Congress out of the equation may tip the balance in favor of investing in the production of customary international law outputs over the production of domestic legislation. The process of bicameralism and presentment ordinarily makes lawmaking expensive and thereby reduces rent-seeking.[178] As Turley notes, the creation of international law outside of the system of bicameralism and presentment raises particular public choice difficulties:

> When analyzed as a form of legislation, international sources present a number of public choice difficulties associated with interest group activity. . . . The collective good is protected by institutional checks and balances, such as the bicameral system and the executive veto, that structure the enactment of domestic legislation. Before legislation becomes law, this delicate balance works to check both legislative opportunism and special interests. . . . International law is a system of treaties, agreements, and customs created in large part outside this representative system, untested by the pluralistic forces that drive the legislative and executive branches. The use of international sources introduces new players and new forms of "legislation" into the carefully balanced Madisonian system. . . . The judicial introduction of a source created wholly outside the Madisonian system poses a number of challenges to the delicate balance set up by the drafters of the Constitution.[179]

Turley, however, incorrectly concludes that "the danger of international sources is not that they are the products of rent-seeking," and that "[a] special interest group is not likely to succeed in influencing the creation of customary international law."[180] Turley's conclusion, of course, relies on the assumption that "customary international law" is limited to development of standards by nations and for nations, such that the political actors involved are presumed to

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178. *See, e.g.*, JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 233-48 (1965); *see also* John O. McGinnis, *The Original Constitution and Its Decline: A Public Choice Perspective*, 21 HARV. J.L. & PUB. POL'Y 195, 203 (1997). McGinnis explained:

> Bicameralism is a second constitutional mechanism that makes it harder for majorities to effect redistribution. Intuitively, the manner in which bicameralism achieves its objective is clear: those pushing rent-seeking legislation must obtain a majority in not one but two legislative bodies. The requirement of a greater consensus should favor legislation that provides public goods that benefit a substantial majority rather than redistribution in favor of a relative few. . . . The majority not only must obtain the assent of two houses of Congress, but also that of the president. . . . Bicameralism and the veto power make rent-seeking harder for concentrated interest groups as well as for majorities, because the interest groups need to expend resources to win the support of a greater number of actors.

Id. at 198. McGinnis continued:

> [T]he requirement that legislation receive the endorsement of the two Houses of Congress as well as the president's assent makes rent-seeking by majorities and special interests more difficult. Thus, interest groups sought to avoid these strictures by having Congress delegate large reservoirs of power to executive branch agencies. Once the power was delegated, interest groups had only to pass over one hurdle—that of the agency—to obtain rent- seeking regulation. At the same time, the United States Supreme Court discarded the non-delegation doctrine that had once policed these blank checks.

Id. at 207; *see also* John S. Baker, Jr., *Constitutional Architecture*, 16 HARV. J.L. & PUB. POL'Y 59, 68 (1993) ("In effect, the 'checks and balances' of bicameralism, serving as an internal check on the legislature, became incorporated as a countervailing force within separation of powers").

179. Turley, *supra* note 32, at 186-92.

180. *Id.* at 267.

have sufficient motive to examine the issues and the costs and benefits are internalized within the political institutions. The ATS breaks down that check, as explained in more detail below.[181]

Finally, because several courts recognize that the ATS provides both jurisdiction and a cause of action for "customary international law" violations, the costly steps requiring additional decision making after the production of a customary international law output (such as domestic execution or implementation) are removed. In this sense, customary international law outputs are deemed "self-executing."[182] This weakens yet another demand constraint on the production of customary international law outputs. It reduces the costs of achieving results from any investment in the production at the customary international law output level.

When courts give legal enforceability to documents produced outside of the costly constitutional process, it: (1) risks enforcing legislative bargains that, due to lower production costs, may lead to inefficient outcomes; and (2) threatens to shift investment in lawmaking to a substitute forum that fails to adequately control rent-seeking behavior. For example, we can expect more investment in customary international law output production by NGOs in this situation.

B. Special Interest Capture and the Failure of Interest Group Competition

In addition to escaping the procedural rigors of domestic production of international law, customary international law output production should be less costly to NGOs than traditional domestic means of producing legislation because (1) there exists a general lack of interest group competition controlling supply in most customary international law output production centers; and (2) many customary international law output production centers are specialized, single interest entities that are highly subject to capture by NGOs. Indeed, this

181. *See infra* Part III.

182. As explained by Judge Randolph, the theory that the ATS creates a cause of action for violations of customary international law is illogical:

> To hold that the Alien Tort Act creates a cause of action for treaty violations, as the *Filartiga* decisions indicate, would be to grant aliens greater rights in the nation's courts than American citizens enjoy. Treaties do not generally create rights privately enforceable in the courts. Without authorizing legislation, individuals may sue for treaty violations only if the treaty is self-executing. *See, e.g.*, Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.); McKesson HBOC, Inc. v. Islamic Republic of Iran, 271 F.3d 1101, 1107 (D.C. Cir. 2001); Princz v. Federal Republic of Germany, 26 F.3d 1166, 1174 n.1 (D.C. Cir. 1994); Holmes v. Laird, 459 F.2d 1211, 1220 (D.C. Cir. 1972); *Tel-Oren*, 726 F.2d at 808-10 (Bork, J., concurring). To illustrate, the detainees in this case claim that the military is confining them in violation of the Geneva Convention of 1949. But the second Geneva Convention, like the first, see *Eisentrager*, 339 U.S. at 789 n.14, is not self-executing for the reasons stated by Judge Bork in *Tel-Oren*, 726 F.2d at 808-09, and by the Fourth Circuit in Hamdi v. Rumsfeld, 316 F.3d 450, 468-69 (4th Cir. 2003). No American citizen, therefore, has a cause of action under this treaty. Yet on the basis of *Filartiga*, and the theory that the Alien Tort Act itself creates a cause of action, aliens could bring suit for its violation.

Al Odah, 321 F.3d at 1146-47 (Randolph, J., concurring).

capture has already occurred and allowed NGOs to dig in should competition emerge.

NGOs have a considerable advantage in bargaining for customary international law outputs because the development of these documents does not include interest group competition, which keeps rent-seeking in check—for example, to date, globalization and international development lobbies have a noticeably diminished presence in the production of customary international law documents, although this may be changing as awareness grows. In fact, at least at the United Nations, institutional standards and biases have favored the participation of those wishing to expand the reach of customary international law while disfavoring other groups.[183]

This situation, and perhaps industry's failure to appreciate the potential impact of emerging international environmental and other "laws," could explain industry and business interests' minor presence in many instances of customary international law output or treaty production. For example,

> Representatives of groups directly impacted by potential commitments [of the Kyoto Protocol]—industry and labor—were fairly limited in Rio (approximately 20% of the accredited NGOs) and fairly split between those standing to lose economic activity—anti-energy-suppression interests such as the coal industry, energy users, mine workers—and those seeking 'rents' through [green house gas] restrictions with mechanisms such as credit-trading schemes.[184]

Yet competition lies at the heart of checks on the production of "legislation," including customary international law outputs. As Betrand Russell explained through a "biological" examination of organizations and power, "every organization will, in the absence of any counteracting force, tend to grow both in size and density of power."[185]

Moreover, as the foregoing suggests, there is a much greater unity of interest among customary international law output expansionist NGOs—in lowering transaction and information costs and allowing for greater coalition building—than exists between affected industry groups. This, too, creates a competitive advantage for customary international law output expansionist NGOs. As Russell explained, "When two organizations with different but not incompatible objects coalesce, the result is something more powerful than either previous one, or even both together," and "[h]ence there is a natural tendency to combination."[186]

Similarly, the interests of expansionist NGOs and production entities frequently align, creating capture effects where the entity becomes beholden to particular special interests, its "clients," and an arm of those interests and their agenda. Capture theory rests on rational choice assumptions that legislative production entities can maximize their own utility by finding favor with the organized interests most likely to provide benefits both inside (such as heightened

183. *See* Horner, *supra* note 153, at 10-15.

184. *Id.* at 15.

185. BERTRAND RUSSELL, POWER: A NEW SOCIAL ANALYSIS 160-61 (1938).

186. *Id.* at 173.

importance, authority and job stability) and outside (such as employment) service.[187]

These capture effects will be difficult to overcome by those seeking to limit customary international law output production. First, production entities want to produce and bureaucracies tend to exhibit self-perpetuating behavior.[188] Thus, the production entities have a disincentive to limit new production of customary international law outputs that might be used to increase regulatory control.

Second, specialized entities such as the U.N. Environmental Programme are far more subject to capture than general interest legislatures. Predictably, interest groups will favor the creation of a highly specialized, single-interest agency because it increases their opportunity for capture.[189] The cost of obtaining rent-seeking legislation is much lower when a special interest need only capture a specific agency. This is especially true because the particular agency will be more dependent on any one interest group for payments when the number of interests related to the purpose of that agency is small.[190] There is substantial evidence that expansionist NGOs have already captured numerous customary international law output production facilities.[191] Having so captured these entities and entrenched themselves, the expansionist interests have an advantage. Even if the regulated entities begin to recognize that competing to control production of customary international law outputs is in their self interest (for example due to the risk of liability from these outputs in litigation), the regulated lobby will face substantial hurdles from such entrenchment.

Finally, expansionist NGO dominance in this field of politics has allowed them to become far more entrenched and familiar with the institutions and procedures necessary to affect their interests. Counter-production interests will face high transaction costs to overcome that advantage of time. For each of these

187. *See* Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 513 (1988). *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

188. *See generally* WILLIAM NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971) (arguing that bureaucracies seek to maximize their budgets); GEORGE C. ROCHE, AMERICA BY THE THROAT: THE STRANGLEHOLD OF FEDERAL BUREAUCRACY (1983); LUDWIG VON MISES, BUREAUCRACY (1944).

189. *See generally* Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 99-101 (1992) [hereinafter Macey, *Organizational Design*] (explaining that interest groups will be more confident in their ability to retain control over agencies, a single client, than in their ability to retain control of the legislature, composed of multiple clients).

190. For a discussion of the theory of capture, see generally Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (June 1984); Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast (writing as McNollGast), *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987). As Macey explained in relation to the thrift industry:

> [L]ong after there was any economic need for a savings and loan industry, thrift regulators took extraordinary steps to ensure the industry's survival. The regulators acted as they did, not to further the public interest, but because they understood that the survival of the industry was crucial to their own professional survival.

Macey, *Organizational Design*, *supra* note 189, at 97.

191. *See generally* SHEEHAN, *supra* note 150.

reasons, competition acts as a weak supply constraint on customary international law output production.

C. *Lacking Formal Elements of Law and An Expectation of Non-Enforcement by Some Bargaining Parties*

Many of the customary international law outputs herein discussed are merely aspirational commitments between nations, and not specific or formal obligations for public or private entities.[192] These types of documents are normally drafted with an understanding that they will not act as law, thereby making their language far less precise and much broader than any signatory might normally wish to embody in a statute. Relying on proclamations of international assemblies creates problems because the texts of these documents are drafted liberally and embody general goals or aspirations as opposed to legally binding principles.[193] *Filartiga, Kadic*, and other cases applying the ATS, however, have looked to such documents as supporting authority for their pronouncements on the existence of an international law.[194]

Often the parties drafting the customary international law outputs upon which the courts increasingly rely and upon which NGOs advocate in court, simply did not intend for these documents to be construed as law. For example, Rusk has stated that "[t]he simple fact is that this [Universal] Declaration [of Human Rights] was not drafted or proclaimed to serve as law."[195] In fact, Eleanor Roosevelt, Chairman of the Commission on Human Rights, stated when presenting the Declaration to the U.N. General Assembly, that "[i]t is not and does not purport to be a statement of law or of legal obligation . . . [it is] a common standard of achievement . . . ."[196] Rusk further contends that this was

192. Turley, *supra* note 32, at 191-92 ("The increasing reliance on international sources in statutory interpretation often ignores the fact that these sources are materially different in character from conventional legislation. . . . [B]efore courts use such sources . . . it is important to consider the implications of these differences for a Madisonian system").

193. For example, in a case where plaintiffs sought jurisdiction under the ATS, one court granted a dismissal for failure to state a claim on the basis that the international principles relied upon, the Stockholm Principles on the Human Environment,

> do not set forth any specific proscriptions, but rather refer only in a general sense to the responsibility of nations to insure that activities within their jurisdiction do not cause damage to the environment beyond their borders. Nor does the Restatement of Foreign Relations law constitute a statement of universally recognized principles of international law.

Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668 (S.D.N.Y. 1991). This type of approach recognizes the limited "legal" nature of international declarations, proclamations, and the like.

194. The *Filartiga* court cited as authority a number of international treaties, "to which the United States is not a party," to establish a universal norm against torture in "modern usage and practice." Louis B. Sohn, *Torture as a Violation of the Law of Nations*, 11 GA. J. INT'L & COMP. L. 307, 308 (1981); *see also* Gabriel M. Wilner, Filartiga v. Pena-Irala: *Comments on Sources of Human Rights Law and Means of Redress for Violations of Human Rights*, 11 GA. J. INT'L & COMP. L. 317, 319 (1981) (noting that *Filartiga* cited "multilateral treaties to which the U.S. [had] not adhered, such as the International Covenant on Civil and Political Rights").

195. Rusk, *supra* note 77, at 313.

196. *Id.* (quoting XIX Bulletin, DEP'T ST. BULL., Dec. 1948, No. 494, at 751).

the understanding of Congress, the Executive, and even the United States delegates to the United Nations:

> As one of the authors of the instruction that Mrs. Roosevelt received from her government on this point, I can report that there was no question in Washington or in New York that the Universal Declaration was not intended to operate as law. There was no serious consultation with the appropriate committees or Congress, as would have been essential had there been any expectation that law was coming into being. Indeed, Mrs. Roosevelt was given great leeway in her part in the drafting of the Declaration partly because it was understood that law was not being created.[197]

The Universal Declaration of Human Rights is but one example. Had the drafters intended for these documents (upon which courts and plaintiffs are relying) to become legally binding in the judiciary, many of them might not have passed out of the multinational body or have been signed by the United States. Had these documents been accepted in some form, they would surely exhibit dramatically different language and scope than would those promulgated with an understanding that the document was merely aspirational. As Rusk stated, "It should be noted . . . that votes cast [on UN General Assembly Resolutions] with the knowledge that the result will not be law are very different from votes that would be cast if there were a general awareness that the result would be operationally and legally binding."[198]

This conclusion, that universal declarations are not meant to act as controlling law, is strengthened by an examination of the bodies creating these documents. Realizing that the United Nations is to have no sovereign authority, Rusk articulates the nature of its "power" as understood by member states. Rusk argues that "The [UN] Charter . . . did not contemplate that the General Assembly would be a legislative body in the field of international law generally . . . ."[199] In fact, "There is little doubt that a general legislative power vested in the General Assembly would have prompted the Senate of the United States to refuse advice and consent to the Charter."[200] Thus, even if Congress could delegate its power to define offenses against the "law of nations" to the United Nations, it clearly did not intend to do so.

Indeed, when states sometimes agree to customary international law outputs, the incentives at play are not carefully based in state agreement that certain standards have truly risen to the level of enforceable international law. As Arangio-Ruiz explains:

> As everybody in the United Nations is convinced that recommendations are *per se* not mandatory, States tend to embellish their image by putting forward draft resolutions. Other States tend naturally to support such drafts. And potential or natural opponents are often reluctant to face the risk of tarnishing or spoiling their own image by opposing the proposal openly or by casting a negative vote.[201]

197. *Id.* at 314.
198. *Id.* at 315.
199. *Id.* at 314.
200. *Id.*
201. Gaetano Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declarations of Principles of Friendly Relations*, 137 RECUEIL DES COURS 419, 457

Simply put, "General Assembly Resolutions remain too unreliable to regard as definitive sources."[202] Similarly, other multinational organizations to which the United States is a party and subordinate entities at the United Nations, all lack a general legislative power. They may have the ability to draft treaties, but even these do not become binding upon the United States unless two-thirds of the Senate chooses to give its consent to the ratification of that treaty.[203] Moreover, even when Congress ratifies a treaty, it may often require additional legislation to "execute" provisions of the treaty.[204]

This has several advantages for expansionist NGOs. First, the existing NGO advantage is buttressed by the fact that the decision makers in the bargaining process: (1) did not or do not now approach the bargaining process as though the resulting standards would be enforceable; and (2) among themselves do not face equal burdens (as in, not all nations or their constituents face equally risk adverse consequences from the enforcement of such international standards in domestic courts), further weakening opposition.

New doctrines that enforce previously drafted customary international law outputs allow NGOs to reap more than was intended originally. Parties in the past often drafted customary international law outputs without an understanding or expectation that it could create legally enforceable standards. Yet NGOs can now use broad aspirational commitments as a means of imposing legal duties. Second, unless and until adversely affected individuals become aware of potential liabilities, NGOs can continue to lobby for broad customary international law outputs.

Third, as long as negotiating parties feel immune to liability from broad customary international law outputs, yet can reap the benefits of selling the symbolic protection of human rights, the environment or the like to their constituents, increased enforceability against some entities may not unleash fierce opposition to customary international law output production. Many state negotiators will feel insulated by sovereign immunity, the Act of State doctrine, or minimal contacts with the United States. Thus, they may not fear continued production of customary international law outputs, particularly if they offer symbolic value to their constituencies. Therefore, they remain unconcerned for those who may become targets of customary international law output enforceability.

(1972-III); *see also* Garibaldi, *The Legal Status of General Assembly Resolutions: Some Conceptual Observations*, 73 AM. SOC'Y INT'L L. PROC. 324, 326 (1979) (calling this a process of "fake agreement").

202. *See* Gregory J. Kerwin, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876, 899 (1983). Kerwin provides an excellent critique of the use of soft customary international law outputs such as General Assembly Resolutions in courts because: (1) they are not intended to serve as binding "law" and (2) because there are many examples of contradictory statements.

203. U.S. CONST. art II, § 2, cl. 2.

204. This is the distinction between self-executing and non-self-executing treaties. Even when Congress ratifies a treaty, convention, or other international document, a non-self-executing treaty will not, through ratification alone, create any automatic, cognizable cause of action for a breach of the agreement. *See Tel-Oren*, 726 F.2d at 808-19 (Bork, J., concurring).

Although some law and economics literature has focused on the development of international law, most of this scholarship has focused on issues of reciprocity, voluntary assent and international cooperation—influences on state decision makers—that work to check the development of inefficient international law rules.[205] But when NGOs can enforce customary international law outputs against private actors in U.S. courts outside of the control of political/state-negotiating institutions, few of the traditional checks on inefficient production of international law apply. Only when we can assume that nation states will (and have the power to) intervene, might these traditional checks play a role. In other words, ATS suits based on customary international law outputs involve an absence of reciprocity. That is, customary international law in the context discussed herein does not, as it has evolved, deal only with relationships among nations in which both the costs and benefits of recognized standards are internalized within a state. Instead, customary international law has moved to standards applicable by and enforceable against private competitors. Absent an identification of internal impacts on themselves, individual nations have no incentive to step in and halt customary international law output production.

III.
NGO Reaction and Predictions

NGOs have taken note of, and exploited advantages of the judicial trend toward enhanced enforceability of customary international law and the role of customary international law outputs in defining the parameters of liability. This article explores two aspects of the NGO response. First, NGOs appear to recognize the benefits to their agendas, which can be gained through tort litigation based on customary international law. Certain NGOs, particularly anti-globalization, environmental, sustainable development, labor rights, and other human rights organizations, are the principal parties spearheading recent lawsuits on behalf of plaintiffs who have allegedly suffered as a result of development projects in underdeveloped and developing countries.[206] These NGOs have also found allies in the domestic plaintiffs' bar, including some of the most influential trial lawyers from the tobacco, asbestos, breast implant, and other high profile mass tort suits of late.[207]

205. *See, e.g.*, Jonathan Baert Wiener, *On the Political Economy of Global Environmental Regulation*, 87 Geo. L.J. 749 (1999); Andrew T. Guzman, *Public Choice and International Regulatory Competition*, 90 Geo. L.J. 971 (2002); John K. Setear, *Treaties, Custom, Rational Choice, and Public Choice*, 94 Am. Soc'y Int'l L. Proc. 187 (2000); Alexander Thompson, *Applying Rational Choice Theory to International Law: The Promise and Pitfalls*, 31 J. Legal Stud. 285 (2002); Francesco Parisi & Catherine Sevcenko, *Treaty Reservations and the Economics of Article 21(1) of the Vienna Convention*, 21 Berkeley J. Int'l L. 1 (2003); Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International Law* (George Mason University Law and Economics Working Paper Series No. 02-08), *at* http://www.gmu.edu/departments/law/faculty/papers/docs/02-08.pdf ("A basic principle of customary law . . . is reciprocity. Further, the Vienna Convention imposes reciprocity on all international law created by treaty").

206. *See, e.g.*, Vosper, *supra* note 10, at 35.

207. *See id.* For example, Steve W. Berman, the attorney who represented over a dozen states in the tobacco litigation, was lead counsel for a group of Papua New Guinea residents who sued,

The theories advanced in these suits appear not only to be attempts to take advantage of the increased recognition of customary international law, but also to further shape federal law to embrace a broad body of federally recognized international torts. Aside from developing law and resolving particular cases, NGOs are also taking advantage of such litigation and the threat thereof to influence corporations to accept and adopt industry-wide international standards for their activities. This article predicts that these industry commitments may not be revocable at some point in the future and may indeed inform (and accelerate) the further development of customary international law. This legally binds industries to such standards in future litigation.

Second, the greater the chance that international "legislative" documents will create domestically enforceable norms in United States courts, the greater incentive NGOs have to invest in the development of customary international law outputs. This article argues that NGO investment in developing customary international law outputs has increased as the documents' values increase due to domestic court recognition of liability for conduct contrary to the standards contained therein. It also predicts that such investment will continue to increase in the future so long as such domestic recognition continues or increases. Furthermore, the likely motivation behind NGO investment in litigation that would begin and expand this trend of judicial recognition is the desire to make previously generated international legislative documents more valuable.

As these demand constraints are weakened, the supply constraints will remain stable, or at best, tighten slowly. For one thing, NGO capture of customary international law output production centers (often single purpose units with longstanding relationships with NGOs) has meant that there is limited competition in the production process. The lack of serious opposition from diffuse interests means that increasing demand from NGOs for customary international law output production will not be significantly checked—at least not in the short run. Although corporations and others subject to potential liability from enforceable customary international law outputs may recognize that they need to become engaged opposition interest groups in the supply of customary international law outputs, several barriers (including entrenched capture) will make it difficult for such groups to operate as a serious constraint on increased supply that will be motivated by increased demand.

Moreover, there are substantial public relations and psychological barriers to opposing many customary international law outputs,[208] especially when drafted with highly aspirational goals and in symbolic terms. Parties will be deterred from opposing production for fear of appearing to be against "good things" or for "bad things."

Thus, although public choice would predict the emergence of equilibrium between opposing sides of the customary international law debate, substantial

among others, Rio Tinto PLC for abuses alleged in conjunction with its mining operations in Papua New Guinea. *See* Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

208. *See generally* Peter Huang, *International Environmental Law and Emotional Rational Choice*, 31 J. LEGAL STUD. 237 (2002).

barriers exist to effectively curb customary international law output production. One of the most valuable means for achieving the desired outcome of equilibrium would be to reinforce the demand constraint of non-enforceability. Congress could, of course, repeal the ATS or otherwise pass legislation limiting the application of customary international law in the courts.

CONCLUSION

It is a simple concept that the more valuable a product becomes, the more it will be demanded. We should expect nothing less when dealing with the production of customary international law outputs from international organizations. As courts accord greater weight to such outputs to establish norms enforceable in litigation, many, including NGOs, will have an incentive to push for the production of customary international law outputs embodying principles that advance their interests.

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Is Nanotechnology Prohibited By the Biological and Chemical Weapons Conventions?

By
Robert D. Pinson*

INTRODUCTION

The advent of nanotechnology promises to bring extensive developments to many aspects of our society. Because it combines physics, engineering, molecular biology, and chemistry, nanotechnology is expected to have a significant impact on drug delivery, computing, communications, defense, space exploration, and energy.[1] Indeed, the effect of nanotechnology on the twenty-first century could be more significant than the "combined influences of microelectronics, medical imaging, computer-aided engineering, and man-made polymers developed in the past century."[2] Currently, nanotechnology's greatest short-term potential lies in the area of materials, such as polymers. Nanotechnology improves the temperature at which plastics can be used, adds flame retardant properties, improves tensile strength, and even increases oxidation resistance.[3] The fabric for stain-resistant khakis incorporates nanotechnology and is just an early example of the many possible short-term applications. Sensors will soon be built into all types of materials, including "gas sensors in car engines [and] toxin detectors in water supplies."[4] While the effects may be vast, many will be so seamlessly integrated into existing materials as to go unnoticed.

While many industries have begun researching nanotechnology, the largest research and development programs are funded by national governments.[5] One

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1. Sonia E. Miller, *A New Renaissance: Tech, Science, Engineering and Medicine Are Becoming One*, N.Y. L.J., Oct. 7, 2003, at 5.

2. Kimm Groshong, *Small World, Big Possibilities: Nanoscience Zooms in on Tiny Stuff of Tomorrow's Reality*, MILWAUKEE J. SENTINEL, Aug. 11, 2003, at 1G (quoting a group of scientists gathered in 1999 by the National Science Foundation).

3. Winn L. Rosch, *Big Business in Small Tech: Nanotechnology Research Thrives, But Venture Capital is Hard to Come By*, THE PLAIN DEALER (CLEV.), June 26, 2003, at S14.

4. Daniel Moore, D.F. Moore: Pizzazz, Panache, and a Phoenix: Materials Science and Nanotechnology (Nov. 19, 2003), *at* http://dfmoore.mu.nu/archives/007027.html.

5. *See* Kelly Hearn, *The Next Big Thing (Is Practically Invisible)*, CHRISTIAN SCI. MONITOR, Mar. 24, 2003, *available at* http://www.csmonitor.com/2003/0324/p17s03-wmcn.htm. Nanotechnology is on course "to be the largest government-funded science project since the space race

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such project is a collaboration between the U.S. Army, the Massachusetts Institute of Technology (MIT), defense contractors, and the medical industry to design a "futuristic 'battle suit' for America's soldiers that's as thin as a scuba diver's wet suit—but fit for a superhero."[6] The suit's material is filled with beads containing magnetic particles that, when lined up, become fifty times stiffer than normal.[7] Soldiers can use this capability to activate a magnetic field when they hear gunfire or create an instant splint for injuries.[8] In Taiwan, researchers are developing a catalyst that converts poisonous carbon monoxide into less-harmful carbon dioxide through the use of gold-silver bimetallic nanoparticles.[9]

In the 2003 fiscal year, the U.S. government budgeted $774 million for nanotech research, while Japan was expected to invest $810 million.[10] Overall, the governments of Europe, China, Japan, Canada, and Singapore have "invested billions of dollars to advance their nanotechnology efforts."[11] Recently, President Bush signed into law the 21st Century Nanotechnology Research and Development Act.[12] The law authorizes $3.7 billion over four years to fund "long-term nanoscale research and development leading to potential breakthroughs in such areas as materials and manufacturing, electronics, medicine and healthcare, environment, energy, chemicals, biotechnology, agriculture, information technology, and national security technology."[13] This act inserts into law what were once presidential initiatives and discretionary spending.

Of course, the prospect of nanotechnology has its drawbacks. A recent study of particular objects known as "nanotubes," revered for their extraordinary strength and electrical conductivity, demonstrated that such objects tend to clump within the lungs, causing suffocation.[14] Evidence also suggests that cells that break up foreign debris in the lungs have more difficulty processing nano-

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of the 1960s." Jennifer Beauprez, *Nanotechnology – Tiny Miracles*, DENV. POST, July 13, 2003, at K1.

6. Abraham McLaughlin, *The Quest to Create a Futuristic Battle Suit, One Micron at a Time*, CHRISTIAN SCI. MONITOR, June 10, 2003, *available at* http://www.csmonitor.com/2003 /0610/p02s01-usgn.html.

7. Beauprez, *supra* note 5.

8. *Id.*

9. Chiu Yu-Tzu, *Taiwanese Achieve a Breakthrough in Nanotechnology*, TAIPEI TIMES, Nov. 11, 2003, at 2, *available at* http://www.taipeitimes.com/News/taiwan/archives/2003/11/11/2003075400.

10. S. REP. NO. 108-147, at 2, 4 (2003). The European Union is expected to spend about $1.2 billion on nanotechnology during 2003 and 2004. *Id.* at 4. In 2002, Japan spent about $650 million on nanotech while the EU spent about $400 million. David Ticoll, *Computing About to Take a Giant Step in Tiny World*, THE GLOBE & MAIL (TORONTO), Sept. 18, 2003, at B12.

11. Christine Hines, *Nanotech: Firms Hope for Small Miracle*, LEGAL TIMES, Nov. 10, 2003, at 1.

12. *President Bush Signs Nanotechnology Research and Development Act*, White House Press Release (Dec. 3, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/12/print/20031203-7.html.

13. James Klein, *President Signs $3.7 Billion Nanotechnology Act*, LARTA VOX (Dec. 8, 2003), at http://www.larta.org/lavox/articlelinks/2003/031208_nanoact.asp.

14. Barnaby J. Feder, *As Uses Grow, Tiny Materials' Safety Is Hard to Pin Down*, N.Y. TIMES, Nov. 3, 2003, at C1.

tubes than larger debris particles.[15] Thus, certain manifestations of nanotechnology may have unknown biochemical properties that are harmful to humans or other living organisms and must be researched before they are let loose in our world.[16] As a result, a need exists for a regulatory regime that can minimize, if not prevent, such dangers from occurring.

Additionally, while significant improvements in military technology such as new battle armor can minimize casualties in combat, mature nanotechnology has the potential to exponentially increase casualties. A nanotech weapon can be more powerful than any known chemical, biological, or nuclear agent because of the incredibly small size of nanoparticles and their ability to penetrate any material or substance.[17] It can be developed and programmed to attack machines.[18] Nanotechnology can even be used to refine existing chemical or biological weapons to make them more potent, less detectable, and easier to produce. Additionally, because of nanotechnology's small size, it can easily be dispersed in the air or through food or water.[19] With this deadly potential, certain types of nanotechnology may fall under the purview of the Chemical Weapons Convention ("CWC"),[20] the Biological Weapons Convention ("BWC"),[21] or both. The application of the CWC and BWC to nanotechnology is the focus of this article.

This article will first explore nanotechnology, its origins, and its developments in Part I. Part II will introduce and analyze the CWC and BWC Conventions and their relevant provisions. Next, Part III will apply the provisions of the CWC and BWC to uses of nanotechnology and examine problems with the CWC and BWC themselves. A discussion of the need for an alternative to these conventions, and other possible solutions, occurs in Part IV. Finally, this article will conclude with some observations on the way forward.

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15. *Id.*

16. Doug Tsuruoka, *Nanotech Boom Expected To Force Legal Scrambling*, INVESTOR'S BUS. DAILY, Sept. 30, 2003, at A05.

17. *See* Chris Phoenix & Mike Treder, *Safe Utilization of Advanced Nanotechnology* (Jan. 2003), *at* http://www.responsiblenanotechnology.org/safe.htm.

18. Joel Rothstein Wolfson, *Social and Ethical Issues in Nanotechnology: Lessons from Biotechnology and Other High Technologies*, 22 BIOTECH. L. REP. 376, 381 (2003).

19. *Id.*

20. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45, 32 I.L.M. 800 (1993) [hereinafter CWC].

21. Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *opened for signature* Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163 [hereinafter BWC].

I.
NANOTECHNOLOGY

A. The Origins of the Concept

Once the topic of science fiction, nanotechnology has now become reality.[22] The word "nano" comes from the Greek word for dwarf.[23] To scientists, the prefix "nano" means one-billionth of something, usually a unit of measurement.[24] Thus, a nanometer is a billionth of a meter, or 0.000000001 meters. To put matters into perspective, a human hair is about 80,000 nanometers in width.[25] Getting smaller, a human red blood cell is about a thousand nanometers in width, while an adenovirus is typically around 100 nanometers wide.[26] A carbon nanotube, commonly understood as "a strip cut from single [sic] sheet of graphite and rolled into a tube until the cut edges join," is about one or two nanometers in diameter.[27]

The idea of nanotechnology originates as far back as ancient Greece, when Democritus suggested "that the world was built of durable, invisible particles—atoms, the building blocks" of matter.[28] A concept akin to nanotechnology was first suggested by Nobel Laureate Richard Feynman in 1959.[29] In a speech entitled "There's Plenty of Room at the Bottom," Feynman discussed the possibility that mankind can "make a thing very small which does what we want"[30] or "arrange the atoms one by one the way we want them."[31] The conceptual gap between micromachines and chemical substances was not fully bridged until much later.[32]

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22. *See, e.g.*, Eric Berger, *Science of the Tiny; Nanotechnology Enthusiasts Laying Path for Innovation*, HOUS. CHRON., Mar. 2, 2003, at A1.

23. THE INTERAGENCY WORKING GROUP ON NANOSCIENCE, ENGINEERING AND TECHNOLOGY, NATIONAL SCIENCE AND TECHNOLOGY COUNCIL, NANOTECHNOLOGY: SHAPING THE WORLD ATOM BY ATOM 3 (Sept. 1999), *at* http://www.ostp.gov/NSTC/html/iwgn/IWGN.Public.Brochure/IWGN.Nanotechnology.Brochure.pdf [hereinafter INTERAGENCY WORKING GROUP].

24. K. ERIC DREXLER ET AL., UNBOUNDING THE FUTURE: THE NANOTECHNOLOGY REVOLUTION 34 (1991).

25. Barry Newberger, *Intellectual Property and Nanotechnology*, 11 TEX. INTELL. PROP. L.J. 649, 651 (2003).

26. *Id.*

27. *Id.*

28. DREXLER, *supra* note 24, at 33.

29. *See* Paul C. Lin-Easton, *It's Time for Environmentalists to Think Small—Real Small: A Call for the Involvement of Environmental Lawyers in Developing Precautionary Policies for Molecular Nanotechnology*, 14 GEO. INT'L ENVT'L. L. REV. 107, 108 (2001); *see also* Glenn Harlan Reynolds, *Environmental Regulation of Nanotechnology: Some Preliminary Observations*, 31 ENVTL. L. REP. 10681, 10682 (2001).

30. Richard P. Feynman, *There's Plenty of Room at the Bottom: An Invitation to Enter a New Field of Physics, Address at the Annual Meeting of the American Physical Society at the California Institute of Technology* (Dec. 29, 1959) *in* ENGINEERING & SCI., Feb. 1960, *available at* http://www.zyvex.com/nanotech/feynman.html.

31. *Id.*

32. DREXLER, *supra* note 24, at 76.

Although the concept of nanotechnology has been used to include any technology operating around 100 nanometers,[33] the original meaning, commonly defined as "molecular manufacturing," entails "manipulating matter on an atom-by-atom or molecule-by-molecule basis to attain desired configurations."[34] The National Science and Technology Council defines nanotechnology as "the ability to work at the molecular level, atom by atom, to create structures with fundamentally new molecular organization and exploit the novel properties exhibited at that scale."[35] While nature already has shown that this process is possible through its own "molecular machines"—cells and organelles—nanotechnology can surpass what natural organisms can create.[36] Nanotechnology can enable the characterization and creation of new materials with extraordinary precision at the atomic level.[37] This unprecedented level of precision would allow the enhancement in a material of any desired property.[38]

The problem with defining nanotechnology is that it does not "stem from one established academic discipline."[39] Generally, nanotechnology is the ability to measure, organize, and manipulate matter at the atomic and molecular levels.[40] With mature nanotechnology comes absolute control over atoms and molecules and thus the ability to create almost anything.[41] Nanotechnology is essentially control of the most basic building blocks of life and the universe around us. Ralph Merkle, a nanotechnology professor at the Georgia Institute of Technology (Georgia Tech), portrayed atoms as "nature's Lego set," describing nanotechnology as the arrangement of tiny Lego pieces to build whatever we want.[42]

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33. *See The Nanotechnology Research and Development Act of 2003: Hearing on H.R. 766 Before the House Science Committee*, 108th Cong. 19 (2003) (statement of Ray Kurzweil, Chariman and CEO, Kurzweil Technologies, Inc.).

34. Frederick A. Fiedler & Glenn H. Reynolds, *Legal Problems of Nanotechnology: An Overview*, 3 S. CAL. INTERDISC. L.J. 593, 595 (1994).

35. John Teresko, *The Next Material World*, INDUSTRY WK., Apr., 2003, at 41.

36. Reynolds, *supra* note 29, at 10682.

37. *See The Nanotechnology Research and Development Act of 2003: Hearing on H.R. 766 Before the House Science Committee*, 108th Cong. 32 (2003) (statement of Dr. Thomas N. Theis, Director of Physical Sciences, IBM Research Division, Thomas J. Watson Research Center) [hereinafter H.R. 766 Hearings].

38. *Id.*

39. ALEXANDER HUW ARNALL, GREENPEACE ENVIRONMENTAL TRUST, FUTURE TECHNOLOGIES, TODAY'S CHOICES: NANOTECHNOLOGY, ARTIFICIAL INTELLIGENCE AND ROBOTICS; A TECHNICAL, POLITICAL AND INSTITUTIONAL MAP OF EMERGING TECHNOLOGIES 12 (July 2003), *at* http://www.greenpeace.org.uk/newtechnology.htm [hereinafter GREENPEACE REPORT].

40. Miller, *supra* note 1, at 5.

41. Glenn Harlan Reynolds, *The Science of the Small*, LEGAL AFF., July/Aug. 2003, *available at* http://www.legalaffairs.org/issues/July-August-2003/feature_reynolds_julaug03.html.

42. *Talk of the Nation/Science Friday: Applications and Ethical Implications of Nanotechnology* (NPR radio broadcast, Sept. 26, 2003). Taking that analogy further, imagine taking these tiny Lego blocks and building a small structure with them. This is the most basic form of nanotechnology. If you attach these blocks ten high and many across, you end up with a very strong block. That is how nanotechnology is being used in materials science right now: to make things much stronger and lighter. Although coal is made up of the exact same atoms as a diamond, a diamond's atoms are arranged in a more organized fashion, resulting in one of the hardest (and most valuable) materials on the planet. *Id.* Now, if these Lego blocks interact with other blocks in ways that cause them to act or move in certain ways when connected (like atoms and molecules), it is

The first work on nanotechnology began in 1977, due to the path breaking work of K. Eric Drexler, the first to create the concept of "assemblers"—nanoscale machines that can build other nanoscale machines.[43] In 1981, the first technical paper was published in the *Proceedings of the National Academy of Sciences*.[44] Only in the 1980s were instruments invented that had the capabilities Feynman spoke about in his 1959 speech.[45] In 1985, the MIT Nanotechnology Study Group was formed and soon began an annual lecture series on nanotechnology.[46] In 1986, Drexler published the first theoretical book on nanotechnology, *Engines of Creation*.[47] The first course in molecular nanotechnology was offered at Stanford University in 1988, which then led to the first major conference on the subject in 1989.[48] In 1991, Drexler co-authored *Unbounding the Future*, which framed nanotechnology in more practical ways, particularly with the use of hypothetical scenarios.[49] Since *Engines of Creation*, what was once thought of as science fiction became more mainstream science and engineering.[50] These days, a search in the news libraries of Westlaw or Lexis can reveal sometimes dozens of articles each day mentioning "nanotechnology."

Nanotechnology can bring about a new industrial revolution[51] because it represents the control of matter at one of the most basic levels—atoms. Not only does nanotechnology involve the most precise control yet over matter, but it is also represents a new method of manufacturing.[52] Instead of the "top-down" approach used in most current manufacturing that involves the removal of unwanted materials from larger groups of raw material, such as creating a sculpture from a block of stone, nanotechnology uses a "bottom up" approach to build larger objects using smaller units such as atoms or molecules.[53]

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possible to build small, moving machines that either mimic already existing, natural assemblies or perform tasks that have never been performed before. This is the more mature form of nanotechnology in which larger structures are "grown"—assembled atom-by-atom or molecule-by-molecule by tiny molecular machines. GREENPEACE REPORT, *supra* note 39, at 12.

43. Lin-Easton, *supra* note 29, at 109. In addition to assemblers, Drexler also envisioned nanoscale machines that could copy themselves over and over, known as "replicators." *Id.*

44. DREXLER, *supra* note 24, at 34.

45. NATIONAL SCIENCE AND TECHNOLOGY COUNCIL, COMMITTEE ON TECHNOLOGY, SUBCOMMITTEE ON NANOSCALE SCIENCE, ENGINEERING AND TECHNOLOGY, NATIONAL NANOTECHNOLOGY INITIATIVE: THE INITIATIVE AND ITS IMPLEMENTATION PLAN 20 (July 2000), *available at* http://www.nsf.gov/home/crssprgm/nano/nni2.pdf [hereinafter NATIONAL NANOTECHNOLOGY INITIATIVE].

46. DREXLER, *supra* note 24, at 34-35.

47. K. ERIC DREXLER, ENGINES OF CREATION (1986), *available at* http://www.foresight.org/EOC/Engines.pdf; *see also* Stephen E. Weil, *The New Millennium Cloning and Copyright*, 19 CARDOZO ARTS & ENT. L.J. 137, 140 (2001).

48. DREXLER, *supra* note 24, at 35.

49. *See generally id.*

50. *See* Weil, *supra* note 47, at 140.

51. Teresko, *supra* note 35.

52. *See generally* Fiedler & Reynolds, *supra* note 34, at 596.

53. *See id.* Notably, it is actually the "top-down" approach that is the oddity in nature. By placing atoms and molecules in certain arrangements, objects of "astonishing complexity" are created. *See id.*

B. The Current State of Nanotechnology

With only basic control of simple nanostructures, nanotechnology is "still in its infancy."[54] While we have a grasp of atoms and simple molecules as well as microstructures and larger devices, the current challenge involves the one to one-hundred molecular diameters range.[55] A revolution in which our ability to manipulate and organize matter on such a small scale is just beginning.[56] This is still in an exploratory phase; we have yet to "understand all of the scientific and engineering issues that define what can happen and what can be done in the nanoscale regime."[57]

A number of products using nanotechnology are already on the market. Clothing retailers such as Levi's and Eddie Bauer already sell pants "that feel like cotton but on an atomic level include a coating that causes dirt, wine or ketchup to bead up and roll right off."[58] Nanogate, a German company, is marketing ceramics for bathtubs and sinks that prevent them from getting dirty.[59] In the sunscreen industry, nanoscale titanium dioxide—an effective, popular sunscreen ingredient—has been developed so that it is transparent and therefore invisible on skin.[60] In early 2003, the University of Michigan announced the use of nanoprobes to "image chemical activity inside living cells."[61] Several Fortune 500 companies, including IBM, Samsung, General Electric, and DuPont, are developing nanotechnology projects such as "faster, smaller computer memory; lower-powered, longer-lasting LED lighting; and display screens for laptops, phones and PDAs."[62] In Taiwan, researchers have developed a bimetallic nanoparticle made of gold and silver that can aid in the pre-production of fuel cells.[63] Additionally, an extremely precise method of detecting cancer is being developed at Georgia Tech with the development of a "nano-spring" structure that reacts when it encounters a cancer protein molecule inside the body.[64] Nanotechnology has also led to products to address modern health concerns, such as particles that kill bacteria, filters that more effectively purify water, and sensors that detect pathogens in food.[65]

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54. NAT'L SCI. FOUND., SOCIETAL IMPLICATIONS OF NANOSCIENCE AND NANOTECHNOLOGY 4 (Mihail C. Roco & William Sims Bainbridge eds., Mar. 2001), *available at* http://www.wtec.org/loyola/nano/NSET.Societal.Implications/nanosci.pdf [hereinafter SOCIETAL IMPLICATIONS].

55. *See id.*

56. *Cf. id.*

57. INTERAGENCY WORKING GROUP, *supra* note 23, at 2.

58. Beauprez, *supra* note 5.

59. *Id.*

60. Newberger, *supra* note 25, at 652.

61. H.R. 766 Hearings, *supra* note 37, at 25 (statement of Richard M. Russell, Associate Director for Technology, Office of Science and Technology Policy).

62. Jack Mason, *Nano Inc. vs. Nano Think*, SALON.COM, Sept. 2, 2003, *at* http://www.salon.com/tech/feature/2003/09/02/nanotechnology/print.html. Additionally, certain tennis rackets and cell phones use nanotechnology elements to improve their performance. H.R. 766 Hearings, *supra* note 37, at 59 (statement of Alan Marty, Executive-in-Residence, JP Morgan Partners).

63. Yu-Tzu, *supra* note 9, at 2.

64. Matthew Broersma, *'Nanospring Pill' Could Detect Cancer Cells*, ZDNET AUSTL. (Nov. 11, 2003), *at* http://www.zdnet.com.au/newstech/enterprise/story/0,2000048640,20280810,00.htm.

65. Hearn, *supra* note 5.

C. Policy Developments

On November 20, 2003, Congress passed the 21st Century Nanotechnology Research and Development Act (the "Act"). This legislation formalized the National Nanotechnology Initiative. In addition, it permanently entrenches nanotechnology as a federal government priority by creating the National Nanotechnology Program ("NNP") and providing a total of $3.7 billion during the years 2004-2008, most of which will go to the National Science Foundation and the Energy Department.[66] The NNP will provide federally funded research; establish goals, priorities, grand challenges, and evaluation guidelines; invest in federal research and development programs; provide for interagency coordination; and establish interdisciplinary nanotechnology centers.[67] The NNP will also research and address societal and ethical concerns related to nanotechnology.[68] When signed into law, the Act will "set research goals, award[ ] grants, encourag[e] interdisciplinary research, . . . and accelerat[e] the commercial application of nanotechnology advances."[69] Many experts agree that such advances will cause more revolutionary products to emerge in the near future.[70] In addition to funding research, the legislation provides for oversight of this research, creating "both a national advisory panel on nanotechnology, and a National Nanotechnology Coordination Office, with responsibility for filing regular reports with Congress and the White House" regarding the progress of the NNP.[71]

D. Future Development

In the near term, most activity in nanotechnology will have to do with research rather than completed products.[72] Currently, approximately 455 companies and 271 academic institutions and governmental entities worldwide are conducting nanotechnology research,[73] and these figures will only increase in the next few years. The next stage of nanotechnology research will deal with the ability to position individual atoms or molecules with extreme precision.[74] Subsequent stages will involve the construction of more accurate tools at the molecular level.[75] As we build smaller and smaller devices, we will use those

66. Jeff Karoub & Juliana Gruenwald, *Senate Approves Nanotech Bill; Next Stops: House and President*, SMALL TIMES, Nov. 19, 2003, *available at* http://smalltimes.com/document_display.cfm?document_id=6973; S. REP. No. 108-147, at 5 (2003).

67. S. REP. No. 108-147, at 4.

68. *Cf.* Neil H. Aronson, *Good Things In Small Packages: Nanotech Gets Funding*, METRO. CORPORATE COUNSEL, Sept. 2003, at 66.

69. *NanoBusiness Alliance Supports Rep. Boehlert's Introduction of the Nanotechnology Research and Development Act of 2003*, BUS. WIRE, Mar. 11, 2003. The program will also address the societal and ethical concerns about nanotechnology. *Id.*

70. H.R. Hearings 766, *supra* note 37, at 6 (Hearing Charter).

71. Glenn H. Reynolds, *Give Thanks for Small Victories*, TECH CENTRAL STATION, Nov. 26, 2003, *at* http://www.techcentralstation.com/112603B.html.

72. GREENPEACE REPORT, *supra* note 39, at 21.

73. *Id.*

74. Fiedler & Reynolds, *supra* note 34, at 600.

75. *Id.* at 601. These tools are known as "protoassemblers." *Id.*

devices to assist in building even smaller ones. At some point, the industry will become "mature nanotechnology," which is where much of the recent commentary has focused.

Commentators believe the most immediate impact of nanotechnology will occur in informatics, pharmaceuticals, energy, and defense.[76] Informatics, consisting of electronics, magnetics and optics, will be enhanced through the improvement of information processing, transmission and storage devices, and flat panel displays.[77] With regard to pharmaceuticals, nanotechnology will greatly enhance our ability to deliver drugs at the right time and in the right places.[78] In the energy sector, research is focused on photovoltaic production, especially in the use of solar power.[79] As for defense, the use of nanotechnology will increase military might, allowing more flexibility and efficiency for responding to threats:

> In peacetime or crisis, nanocomputers may allow more capable surveillance of potential aggressors. . . . In low-intensity warfare, intelligent sensors and barrier systems could isolate or channel guerrilla movements depending on local terrain. In conventional theatre war, nanotechnology may lead to small, cheap, highly lethal anti-tank weapons. Such weapons could allow relatively small numbers of infantry to defeat large assaults by large armoured forces. At nuclear conflict levels, accurate nanocomputer guidance and low nanomachine production costs would accelerate current trends in proliferation of 'smart' munitions. Rather than requiring nuclear weapons . . . nanotechnology enhancements to cruise missiles and ballistic missiles could allow them to destroy their targets with conventional explosives.[80]

In addition to affecting weaponry, research is under way to reengineer the modern soldier by improving and lightening his gear for enhanced protection, survival, and mobility.[81] New nanotech battle gear would resemble something out of science fiction; it would monitor the soldier's physical condition, track his location, and even protect him from bullets and shrapnel.[82] A suit could have the ability to change color to camouflage into its surroundings.[83] A wounded soldier's suit would send out a signal for help, administer medicines, and perhaps even turn soft fabric into a cast when necessary.[84] Sensors may also be incorporated into the fabric to detect the presence of harmful chemical, biologi-

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76. GREENPEACE REPORT, *supra* note 39, at 21-31.

77. *Id.* at 22. For a summary of applications in informatics, see *id.* at 26.

78. *Id.* at 27.

79. *Id.* at 27, 29. A primary goal is to create photo-reactive materials that can be painted onto a surface. Jennifer Alvey & Michael T. Burr, *Energy Tech's Quantum Leap; Tomorrow's Utility Technology May Be Revolutionized at the Molecular Level*, PUB. UTILS. FORTNIGHTLY, Nov. 1, 2003, at 22. If solar power were cheaper and more prevalent, then our dependence on oil for energy would be lessened. *See* Kevin Maney, *Tiny Technology that Could: Nanotech Could Solve Oil Issues*, USA TODAY, Oct. 1, 2003, at 3B.

80. GREENPEACE REPORT, *supra* note 39, at 30 (quoting Scott Pace, *Military Implications of Nanotechnology*, FORESIGHT UPDATE 6, Aug. 1, 1989, at 2, *available at* http://www.foresight.org/Updates/Update06/Update06.2.html).

81. *Id.* at 30-31.

82. *Id.*

83. Anne Barnard, *MIT Given $50M to Equip Troops*, BOSTON GLOBE, Mar. 14, 2002, at A1.

84. *Id.* This ability to go from soft to hard may also be a means to protect against bullets or other lethal objects.

cal, and even nanotechnological agents.[85] Additionally, power for the soldier's equipment may come from photovoltaic cells or thermoelectric devices incorporated into the suit itself.[86]

The ultimate way to protect soldiers is to not use them in battle at all. Nanotechnology could be used to enhance automation and robotics so that humans will not need to go into combat.[87] Indeed, the U.S. military is already working on an unmanned combat air vehicle with the goal of also having remote-controlled bombers, helicopters, and submarines.[88] Drones have already dropped bombs and taken photographs and video of dangerous locations.[89] Analysts believe that at the very least, unmanned aircraft "can be used for potentially dangerous environmental monitoring, such as checking air quality for chemical and biological weapons."[90]

By 2015, the world nanotech market is predicted to exceed $1 trillion.[91] As a result, almost 800,000 workers may be needed to support that industry.[92] In medicine, nanotech is expected to reduce the cost of patient care while improving quality of life.[93] Nanotechnology's effect is forecast to be widespread because it integrates such diverse fields as physics, engineering, biology, and chemistry.[94] With advances in each of these fields, nanotech can have a positive impact on our quality of life—assuming the risks are properly managed.

E. Why We Should Embrace Nanotechnology—Cautiously

The future will bring many beneficial uses for nanotechnology. Nanotech promises to enhance our quality of life through improved medical diagnosis, more efficient energy sources, and the creation of new materials in electronics, optics, and materials science.[95] Additionally, more environmentally friendly manufacturing techniques will help "eliminate pollution, mitigate environmental hazards, detect contaminants, reduce emissions, avoid toxic leaks, and improve energy efficiency."[96]

Nanotechnology has many potential health benefits, such as programming special "nano-devices" called "dendrimers" to enter the body and destroy arte-

85. *See* McLaughlin, *supra* note 6.

86. Bernadette Tansey, *Molecular Might: Nanotech 'Battle Suits' Could Amplify Soldiers' Powers*, S.F. CHRON., Apr. 7, 2003, at E1.

87. NATIONAL NANOTECHNOLOGY INITIATIVE, *supra* note 45, at 24.

88. James John Bell, *Exploring the 'Singularity,'* THE FUTURIST, June 1, 2003, *available at* http://www.kurzweilai.net/articles/art0584.html?printable=1. Sadly, we could develop the technology to the point where teenagers could fight our battles as if the battles were mere video games.

89. *Technology Removes Need for Human Pilots*, CNN.COM, *available at* http://www.cnn.com/2003/TECH/ptech/11/24/aviation.drone.reut/index.html (Nov. 25, 2003).

90. *Id.*

91. Beauprez, *supra* note 5, at K1. This is more than twice the annual revenue of today's pharmaceutical industry. Ellen McCarthy, *Region Sees Big Market in The Little Things*, WASH. POST, Oct. 16, 2003, at E1.

92. Beauprez, *supra* note 5, at K1.

93. Aronson, *supra* note 68, at 66.

94. Miller, *supra* note 1, at 5.

95. *Id.*

96. *Id.*

rial plague or cancer cells, or repair cellular damage—even that caused by aging.[97] Nanotechnology also has the potential to practicably use solar power on a massive scale, replace gasoline in cars with hydrogen and methane, and lighten vehicles to reduce fuel consumption.[98] Over the long term, solar energy could become one hundred times more efficient, thus reducing the West's dependency on foreign oil.[99] In addition to creating more energy sources, nanotechnology has the potential to reduce worldwide energy consumption by more than ten percent.[100]

Unfortunately, many potentially negative effects from nanotechnology exist as well. The most commonly predicted risk is an accidental mutation or release of self-replicating nanorobots causing significant damage to the planet—some say even total destruction.[101] This catastrophic doomsday scenario, however, is unlikely because no one is currently working on nanorobots; if we lack the ability to create normal sized robots, it is unlikely we will develop nanorobots anytime soon.[102] This doomsday scenario is also of little concern compared to the very real risk of *deliberate* developments of weaponized nanotechnology.[103] Nanotechnology's "microscopic size, easy dispersal, [potential] self-replication, and potential to inflict massive harm on persons, machines, or the environment" makes it a tempting weapon, especially to terrorists.[104] More near-term nanotech developments could enable one to "assemble, molecule by molecule or chain by chain, any compound one desires."[105] Thus, terrorists or countries may use this technology to create pure mixtures of dangerous toxins or chemical agents.[106] In addition, mature nanotech could itself act as an artificial chemical or biological agent.[107] Clearly, such developments point toward the prospect of a nanotechnology arms race.[108]

The further development of nanotechnology appears inevitable because of its many potential benefits; one can only hope that the risks associated with it are also controllable. The most drastic course of action would be to stop all research and development of nanotechnology, but the safest way forward is to develop the technology and work to prevent accidents and misuse.[109] The inevitability of the development of nanotechnology demonstrates the urgency to ben-

97. Reynolds, *supra* note 29, at 10683.

98. Maney, *supra* note 79, at 3B.

99. *Id.*

100. GREENPEACE REPORT, *supra* note 39, at 27. See *id.* at 29 (providing a chart of nanotechnology's potential applications for energy processing).

101. *See* Drexler, *supra* note 47, at 172-73, 241 (describing the so called "gray goo" problem); *see also Accidents, Malice, Progress, and Other Topics*, FORESIGHT BACKGROUND 2, REV. 1 (1987-91), *at* http://www.foresight.org/Updates/Background2.html.

102. *See* Jon Van, *Invasion of Nanobots Not in the Big Picture*, CHI. TRIB., July 19, 2003, at C3.

103. Phoenix & Treder, *supra* note 17.

104. Wolfson, *supra* note 18, at 381.

105. *Id.*

106. *Id.*

107. Reynolds, *supra* note 29, at 10684.

108. *Id.*

109. *See generally* DREXLER, *supra* note 24, at 246-64; *see also* H.R. 766 Hearings, *supra* note 37, at 66 (statement of Christine Peterson, President, Foresight Institute).

efit from what it has to offer, but also to have a regulatory scheme in place to provide guidance and ensure safety.

II.
THE WEAPONS CONVENTIONS

A. Biological Weapons

1. Biological Warfare

Biological warfare, also known as "germ" or "bacteriological" warfare, is the use of living organisms or their infective material that are "intended to cause disease or death" and "depend for their effects on their ability to multiply" in the victim.[110] While the origin of biological warfare is unknown, its first uses can be traced back to around 600 B.C.[111] Such early uses involved spreading of infection through the use of corpses and filth, as well as the use of poisonous roots.[112] Hannibal was known to catapult poisonous snakes at enemy ships and to leave poisoned wine for advancing enemy forces to drink as they looted the camp.[113] In 1763, the British used smallpox against Native Americans by trading purposely-infected blankets.[114]

The advantage of biological weapons is that they result in mass death without harming physical infrastructure.[115] They are alluring because their "slow-acting effects resemble natural maladies, making it difficult for the victim to attribute damage to the enemy."[116] Usually invisible, the particles enter the body or infect the food or water supply before anyone is aware of their presence. However, biological weapons are uncontrollable and unreliable and may linger, potentially causing harm to the invading attacker.[117] Even worse, biological weapons can evolve and multiply out of control, risking contamination of the attacker's land.

2. Geneva Protocol

Although biological weapons have been used for millennia, the first international treaty regulating the use of such weapons was in 1925.[118] The Geneva

110. Kristen Paris, *The Expansion of the Biological Weapons Convention: The History and Problems of a Verification Regime*, 24 HOUS. J. INT'L L. 509, 513-14 (2002). Examples include anthrax, Q fever, typhus, smallpox, VEE, botulinum toxin, dengue fever, Lassa fever, and Ebola. *Id.* at 514.

111. Scott Keefer, *International Control of Biological Weapons*, 6 ILSA J. INT'L & COMP. L. 107, 112-13 (1999).

112. *Id.*

113. *Id.* at 113.

114. *Id.*

115. Barry Kellman, *Bridling the International Trade of Catastrophic Weaponry*, 43 AM. U. L. REV. 755, 763 (1994).

116. *Id.* at 764. Biological weapons are also cheap to develop; thus, the moniker "Poor Man's Atomic Bomb." Paris, *supra* note 110, at 515.

117. Kellman, *supra* note 115, at 763.

118. Heather A. Dagen, *Bioterrorism: Perfectly Legal*, 49 CATH. U. L. REV. 535, 542 (2000). While the United States signed this treaty in 1925 and has generally abided by its terms, it did not ratify the treaty until 1975. *Id.*

Protocol[119] prohibited only the *use* of biological weapons, not their development, testing, production, or stockpiling.[120] The Geneva Protocol also only applied to times of war, not during times of peace.[121] Despite the existence of this treaty, countries continued to produce, stockpile, and even use biological weapons.[122] In fact, two growing world powers, Japan and the United States, did not even ratify the Protocol.[123] Additionally, several nations expressed reservations to the Protocol, effectively creating exceptions to the ban.[124] These two factors significantly weakened the influence of the Protocol.[125] In 1970, however, the United States destroyed its stockpile of such weapons, just as other nations began to push for an alternative to the Geneva Protocol.[126]

3. *Biological Weapons Convention ("BWC")*

The BWC developed in 1972 as a result of U.S. resolve to rid both itself and the world of biological weapons.[127] Negotiations for a stronger rule of law led to the BWC.[128] Unlike the Protocol, the three major world powers—the United States, Russia, and the United Kingdom—ratified the BWC, lending it credibility.[129]

The BWC bans the "development, production, stockpiling, acquisition, or retention of biological weapons or biological agents in types or amounts that are not justified for peaceful purposes."[130] Unlike the Geneva Protocol, the BWC is an arms control treaty; its provisions apply at all times.[131] While countries were allowed to join starting on April 10, 1972, the BWC did not take effect until March 26, 1975, at which time twenty-two states, including the Soviet Union, the United Kingdom, and the United States, joined the Convention.[132] The BWC is of unlimited duration and had 147 members as of December, 2002.[133] Sixteen countries have signed but not ratified the BWC—including Egypt and Syria—and thirty countries have failed to sign the BWC—including Israel and Sudan.[134]

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119. Protocol on the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter Geneva Protocol].

120. Paris, *supra* note 110, at 516.

121. *Id.* at 517.

122. *Id.*

123. Keefer, *supra* note 111, at 121.

124. *Id.* at 121-22.

125. *Id.*

126. Paris, *supra* note 110, at 517.

127. Keefer, *supra* note 111, at 122.

128. *Id.*

129. *Id.*

130. Dagen, *supra* note 118, at 546.

131. *Id.* at 547.

132. Jenni Rissanen, *The Biological Weapons Convention* (Mar. 2003), *available at* http://www.nti.org/e_research/e3_28a.html.

133. *Id.*

134. *Id.*

What distinguishes the BWC from other weapons conventions is that it is the "first disarmament treaty to completely ban an entire class of weapons."[135] The BWC prohibits the development, production, stockpiling, acquisition and retention of microbial or other biological agents or toxins in types and quantities that have "no justification for prophylactic, protective or other peaceful purposes."[136] All weapons, equipment, and means of delivery designed to use such agents are also prohibited when they are designed to be used "for hostile purposes or in armed conflict."[137] Article II is viewed as the nucleus of the BWC because it "provides for actual disarmament and sets a time limit for destruction of the weapons."[138] Article III prohibits members from transferring any the agents, toxins, weapons, equipment, or means of delivery mentioned in Article I to other states or organizations, and also forbids them from encouraging any state or organization to acquire such materials.[139] Article IV requires parties to ensure that the BWC is followed within their territory.[140]

In order to prevent the proliferation of biological weapons, the BWC incorporates a method for addressing alleged violations.[141] In Article VI, a party alleging violations by another party may file a detailed complaint with the United Nations Security Council.[142] If an investigation is commenced, all parties must cooperate pursuant to Articles VI-VII.[143] These enforcement provisions, however, are criticized for their lack of verification measures.[144] Article X is also significant in that it discusses peaceful scientific research and development, allowing parties to participate in any legitimate, peaceful activities involving biological agents.[145] This appears to include defensive, commercial, and health-related applications. Article X provides for the facilitation of the "fullest possible exchange of equipment, materials and scientific and technological information" for the use of biological agents and toxins for peaceful purposes.[146] While Article XI allows for amendments to the BWC, Article XII provides for a conference "to review the operation" of the BWC "with a view to assuring that the purposes and the provisions of the BWC are being realized."[147] The remaining articles deal with duration, withdrawal, the signing and ratification process, and other administrative issues.[148]

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135. *Id.*

136. BWC, *supra* note 21, art. I, 26 U.S.T. at 587, 1015 U.N.T.S. at 166.

137. *Id.*

138. Paris, *supra* note 110, at 519.

139. *See* BWC, *supra* note 21, art. III, 26 U.S.T. at 587, 1015 U.N.T.S. at 167.

140. *Id.*, art. IV, 26 U.S.T. at 588, 1015 U.N.T.S. at 167.

141. Dagen, *supra* note 118, at 547. *See also* BWC, *supra* note 21, art. VI, 26 U.S.T. at 588, 1015 U.N.T.S. at 167.

142. *See id.*

143. *Id.*, arts. VI-VII, 26 U.S.T. at 588-89, 1015 U.N.T.S. at 167. *See also* Dagen, *supra* note 118, at 547.

144. Dagen, *supra* note 118, at 548.

145. Paris, *supra* note 110, at 519; *see also* BWC, *supra* note 21, art. X, 26 U.S.T. at 590, 1015 U.N.T.S. at 167-68.

146. *Id.*

147. *Id.*, arts. XI-XII,.26 U.S.T. at 590-91, 1015 U.N.T.S. at 168.

148. *See id.*, arts. XIII-XV, 26 U.S.T. at 591-92, 1015 U.N.T.S. at 168-69.

In addition to the definition of prohibited biological agents provided above,[149] the BWC also prohibits toxins, regardless of their properties.[150] Agents created using recombinant DNA or genetic engineering that fit this definition are also included under the BWC.[151] While the BWC does not explicitly prohibit the "use" of biological weapons, the Final Declaration of the 1996 Treaty Review Conference reaffirmed that the Convention prohibits this type of use.[152]

B. Chemical Weapons

1. History

While not as old as biological weapons, chemical weapons have been used extensively in war, particularly in World War I[153] and most recently by Iraq.[154] The Geneva Protocol banned the wartime use of chemical weapons in the form of poisonous gas,[155] but unfortunately the Protocol failed to effectively remove such weapons from the battlefields. Chemical weapons were apparently used by both sides during the Iran-Iraq war and by Saddam Hussein against the Kurds in the early 1980s. Because the Geneva Protocol failed to prevent the development, proliferation, and use of chemical weapons, the need for a new treaty was recognized.[156]

2. What Are Chemical Weapons Under the CWC?

Recognizing the inadequacies of the Protocol and the growing proliferation of chemical weapons, the Conference on Disarmament was authorized by the United Nations to "negotiate a multilateral convention that would completely and effectively prohibit the development, production, stockpiling, and transfer of these weapons."[157] On January 13, 1993, the CWC was opened for signature.[158] After the requisite sixty-five countries ratified it, the CWC entered into force on April 29, 1997.[159]

149. *See* Paris, *supra* note 110 and accompanying text. Oddly enough, the BWC does not specifically mention any covered agents. Biological warfare is the "wartime use of living organisms, usually micro-organisms, for hostile purposes, such organisms causing disease or death in man, animals, or plants following multiplication within the target organism." Elizabeth A. Smith, *International Regulation of Chemical and Biological Warfare: "Yellow Rain" and Arms Control*, 1984 U. ILL. L. REV. 1011, 1011 n.6 (1984) (quoting Howard S. Levie, *Humanitarian Restrictions on Chemical and Biological Weapons*, 13 U. TOL. L. REV. 1192 (1982)).

150. Smith, *supra* note 149, at 1044.

151. *Id.* at 1044 n.222.

152. Rissanen, *supra* note 137.

153. Kellman, *supra* note 115, at 762.

154. *Id.* at 762-63.

155. *Id.* at 809.

156. *Id.* at 809-10.

157. *Id.* at 810.

158. Urs A. Cipolat, *The New Chemical Weapons Convention and Export Controls: Towards Greater Multilateralism?*, 21 MICH. J. INT'L L. 393, 398 (2000).

159. *Id.* For a listing of the signatory nations, see http://www.opcw.org/html/db/members_ratifyer.html.

The Chemical Weapons Convention defines "chemical weapons" as, together or separately:

> (a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under the Convention, as long as types and quantities are consistent with such purposes;
>
> (b) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a) above, which would be released as a result of the employment of such munitions and devices;
>
> (c) Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).[160]

The definition of chemical weapons in subparagraph (a) is intentionally broad to prohibit known and unknown toxic chemicals, including those developed in the future, in "types and quantities that cannot be justified" for the defined permitted purposes.[161] This definition attempts to encompass any chemical agents that may be developed in the future. Subparagraphs (b) and (c) also prohibit any munitions and devices specifically designed to release chemical weapons, including spray tanks and canisters, as well as any equipment specifically designed to be used solely in connection with such munitions and devices.[162] This all-inclusive definition seeks to not only prevent the existence of banned substances, but to also prohibit the development, possession, and use of items normally associated with chemical warfare, such as gas canisters and the trucks that carry them. However, because of the language "directly," dual-use munitions and their components are not banned as long as they do not otherwise meet the definition of a chemical weapon.[163] Members are therefore allowed to possess tanks, aircraft, and other weapon systems with the potential to deliver or carry chemical weapons, if they are needed to participate in conventional warfare.[164]

The term "toxic chemical" is defined as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals."[165] The definition includes all such chemicals, "regardless of their origin or their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere."[166] The wording of this definition is intended to cover toxins, organic chemicals, inorganic chemicals, and chemicals produced by binary and multicomponent

160. CWC, *supra* note 20, art. II, 1974 U.N.T.S. at 319-20.

161. Message from the President of the United States Transmitting the Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Nov. 23, 1993, S. TREATY DOC. NO. 103-21 (1993), 1993 U.S.T. LEXIS 107, at *63 [hereinafter CWC S. TREATY DOC.].

162. *Id.* at *63. Perhaps this equipment refers to equipment used to assemble the munitions and devices or to deliver them to the battlefield (that is, launchers).

163. *Id.* at *64.

164. *Id.*

165. *Id.* at *23-24.

166. *Id.* (parentheticals omitted).

weapons.[167] Article II of the CWC defines which chemicals are considered chemical weapons.

The purposes not prohibited under the CWC as mentioned above in subparagraph (a) are listed in Paragraph 9 of Article II and include:

> (a) Industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;
> (b) Protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons;
> (c) Military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare; and
> (d) Law enforcement including domestic riot control purposes.[168]

With this language, the CWC allows use of toxic chemicals and their precursors, as long as they are of a type and quantity consistent with one or more of these enumerated purposes.[169] Thus, countries may still use these chemicals for such purposes as "gaining confidence in chemical defense training and equipment and using riot control agents for chemical defense training" as well as for purposes "not dependent upon the toxic properties of the chemicals as a method of warfare, such as the use of toxic chemicals as fuels, lubricants or cleaners."[170] Finally, countries may still use toxic chemicals for law enforcement, although the *type* used must be consistent with that purpose.[171]

3. The Chemical Weapons Convention Regulatory Scheme

The CWC prohibits the development, production, stockpiling, and use of chemical weapons.[172] Because it is so easy for a country with a modern chemical industry to produce chemical weapons, the CWC creates a powerful regime to oversee the parties and ensure that they comply with the objectives of the CWC.[173] The key to the CWC is its verification procedure—every party to the agreement is subject to the verification measures.[174] This requires an "elaborate mechanism for monitoring all production and acquisition of various chemicals."[175]

The Verification Annex of the CWC describes the verification process. Part II has multiple sections dealing with the general verification process. Section A describes how inspectors are designated and how members subject to inspection can accept or reject specific inspectors.[176] However, once an inspection is announced, the subject country cannot reject any inspector on that inspec-

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167. *Id.* at *64-65.
168. *Id.* at *23-24.
169. *Id.* at *73.
170. *Id.* at *73-74.
171. *Id.* at *74. Something like nerve gas cannot be used for "capturing escaping prisoners." *Id.*
172. U.S. Chemical Weapons Convention, *About CWC*, *at* http://www.cwc.gov/overview/about_html (last visited Nov. 17, 2003).
173. *Cf.* Kellman, *supra* note 115, at 811.
174. *Id.*
175. *Id.* at 812.
176. CWC, *supra* note 20, Verification Annex pt. II.A, 1974 U.N.T.S. at 372-73.

tion team.[177] Section B grants diplomatic privileges and immunities to inspectors, their assistants, and observers.[178] Many of these immunities and privileges are similar to those held by regular diplomats and inspectors under the Intermediate-Range Nuclear Forces Treaty and the Strategic Arms Reduction Treaty.[179] Section C contains the arrangements regarding "points of entry, respective rights and obligations when more than one State is involved in an inspection . . . administrative arrangements, and use of approved equipment."[180] Section D describes the required pre-inspection activities of notice, entry, transit, and briefings. Section E sets forth the general rules for conduct of inspections, including "provisions on safety and communications, inspection team and inspected State Party rights, and provisions on the collection, handling and analysis of samples, extension of inspection duration, and debriefing by the inspection team."[181] The rest of Part II discusses the final report of the inspectors and how the general provisions apply also to more specific provisions in the Verification Annex.[182]

Two innovative aspects of the CWC make it more advanced than other weapons treaties. First, a series of "Schedules" determines the level of regulation for dual-use substances; second, challenge inspections may occur, with some limitations, at any facility where reasonable doubt exists regarding compliance with provisions of the CWC.[183] Three Schedules exist that divide precursor chemicals according to the ease of using them to make a prohibited substance and their legitimate, non-prohibited value.[184]

Schedule 1 covers "supertoxic lethal chemicals" that:

(1) are actual warfare agents;
(2) pose a high risk of potential use as chemical weapons;
(3) are key precursors with chemical structures closely related to chemical weapons;
(4) pose a high risk of conversion into chemical weapons; or
(5) have little use for purposes other than chemical weapons.[185]

Schedule 2 deals with chemicals that have some legitimate commercial uses, but are also key precursors posing a significant threat to CWC objectives.[186] Schedule 3 contains chemicals that are "several steps removed from warfare agents," but have properties similar either to chemicals used in weapons

177. *Id.*

178. *Id.*, Verification Annex pt. II.B, 1974 U.N.T.S. at 373-75.

179. CWC S. TREATY DOC., *supra* note 161, at *265. For a list of the specific provisions, see *id.* at *267-73.

180. *Id.* at *276.

181. *Id.* at *296-97.

182. *Id.* at *312-316.

183. Kellman, *supra* note 115, at 812.

184. Barry Kellman, *The Advent of International Chemical Regulation: The Chemical Weapons Convention Implementation Act*, 25 J. LEGIS. 117, 119 (1999). For a detailed analysis of the three Schedules, see CWC S. TREATY DOC., *supra* note 161, at *237-45. For the list of chemicals in each Schedule, see *id.* at *719-20.

185. Kellman, *supra* note 115, at 812.

186. *Id.* at 812-13.

or important precursors to chemicals in Schedules 1 or 2.[187] Because chemicals and facilities vary based on their potential risks to the purpose of the CWC—the prohibition and destruction of chemical weapons—the chemicals are broken down into three categories based "on increasing utility in civilian production and a decreasing perception of risk."[188] Each Schedule has differing limits on production, verification regimes for source facilities, and requirements for declarations.[189] The determining risk is based on "the toxicity of the chemical, its potential use in the chemical weapons production process, and the purpose for which it has been, is currently, or could be used."[190] While most known toxic chemicals have already been placed in the Schedules, the placement of future additions depends on "the potential for use in an activity prohibited by the [CWC]; the volume of peaceful production; past history of use as a chemical weapon; and level of toxicity."[191] The level of regulation lessens as the Schedules descend: Schedule 1 requires the highest level of regulation and Schedule 3 requires the lowest.

Challenge inspections serve to complement routine inspections, deterring violations and gathering information without hampering members' development.[192] If a member suspects another's noncompliance, it may request an inspection at any location or facility.[193] Upon such request, the country under suspicion must "make every reasonable effort" to demonstrate compliance.[194] "If suspicions remain, an inspection team will arrive after twelve hours' [sic] notice, and the inspected state must transport the team to the challenged facility within twenty-four hours."[195] After negotiating the terms and extent of the inspection, the inspectors have eighty-four hours to complete their inspection unless an extension is allowed by the inspected nation.[196] Through the use of routine and challenge inspections, the CWC attempts to sufficiently detect violations while also protecting national security, commercial secrets, and privacy rights of the member nations and their chemical industries.[197]

III.
DO THE WARFARE TREATIES APPLY TO NANOTECHNOLOGY?

A. The Concept

In 2001, Glenn H. Reynolds suggested that nanotechnological devices developed for military use may fall under the BWC or the CWC.[198] While noting

187. *Id.* at 813.
188. CWC S. TREATY DOC., *supra* note 161, at *123.
189. *Id.*
190. *Id.* at *124.
191. *Id.*
192. Kellman, *supra* note 115, at 814.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *See id.* at 814-15.
198. Reynolds, *supra* note 29, at 10684.

that such devices "would be functional equivalents of chemical and biological weapons," Reynolds speculated that they most likely do not fall under the purview of either of the two treaties.[199] Arguably, nanotechnological weapons would somehow work differently than chemical or biological weapons; however, there are such great similarities between natural molecular technology and nanotechnology that there may be no justification for separating the two.[200] This determination ultimately depends on the use and function of the nanotechnology and does not apply universally.

B. Biological Weapon Under the BWC?

Certain types of nanotechnology fit a portion of the current definition of a biological weapon; something used with the intent to kill or cause disease and which is able to multiply in the victim to cause the intended effect. However, it is unclear whether any nanotechnologies fit the aspect of the definition about being a living organism.[201] While some types of nanotechnology may resemble bacteria or viruses, the fact that they are mechanically assembled seems to indicate that they cannot be classified as living organisms.

Article I of the BWC prohibits the development, production, and possession of "[m]icrobial or other biological agents, or toxins whatever their origin or method of production . . . ."[202] Assuming microbial or biological agents should be considered living things, can a toxin be something inorganic or artificially created? Since the phrase "whatever their origin or method of production" relates to toxins because of the comma placement, it seems to include so-called mechanical devices that could result from mature nanotechnology. In this sense, one can argue that nanotechnology—particularly nanorobots—can be treated as a toxin if it causes harm similar to other already known toxins. However, because the BWC seems to deal only with biological organisms or products thereof, a strong argument can be made that the artificially assembled products that nanotechnology would produce cannot possibly fit under the BWC. Perhaps the only way nanotechnology can fall under the BWC's prohibitions without a doubt is if it were used to artificially create exact replicas of known biological weapons or toxins. Only then would it clearly be covered since no difference would exist between the natural product and the "artificial" version. However, nanotechnology as a field is much broader than these narrow "biological replica" applications.

Another issue arises with the "prophylactic, protective or other peaceful purposes" language in the BWC.[203] It can be argued that almost any biological agent or toxin can be maintained for one of these reasons. Self defense, training,

199. *Id.*

200. Fiedler & Reynolds, *supra* note 34, at 615. This distinction is made more difficult because our technological advances seem to blur the lines between nature and machine. Bell, *supra* note 88.

201. *See supra* section II.A.3 (elucidating further difficulties the BWC faces in regulating nanotechnology).

202. BWC, *supra* note 21, art. I, 26 U.S.T. at 587, 1015 U.N.T.S. at 166.

203. *Id.*

improvement of safety, or vaccination are perfectly legitimate reasons for keeping stockpiles of some of the worst biological weapons. Of course, very low quantities would be required because of the organism's ability to grow in the right medium. The same goes for nanotechnology, especially if it is able to self-replicate upon command. It may be argued, however, that possessing the types of nanotechnology that even remotely resemble a biological weapon is not justified, even for other peaceful purposes. In this sense, universal assemblers—nanotech devices that can construct anything—would likely be treated as biological weapons. But it would be overkill to ban such a valuable tool that can do so much more.

Uses of nanotechnology that were beneficial to humanity would most certainly fit under the peaceful purposes exception. For example, nano-devices used to prevent diseases would likely be for a "prophylactic, protective or other peaceful purpose."[204] Performance-enhancing nanotechnology could also be a peaceful purpose, even if it is used in soldiers, because the technology itself would not be used as a weapon. It would only make a current "conventional" weapon—our soldiers—more lethal. In addition, refinements of already existing conventional weapons by nanotechnology would be allowed under the BWC because the underlying weapon is not a biological agent or toxin. Even if it were treated as a biological weapon, it would still be allowed under the BWC because it would be for a protective purpose, which is allowed under Article I.

The final flaw in the BWC is the absence of an effective verification process. A verification regime for the BWC is difficult because "any nation with a developed pharmaceutical industry has the potential to make biological weapons."[205] The small amount of the agent required to create a biological weapon also makes verification difficult.[206] Additionally, the materials used to create biological weapons are difficult to monitor because they are commonly "dual use technologies that can be used legitimately for pharmaceutical purposes."[207] Finally, due to the competitive market for pharmaceuticals and biotechnology, private firms are reluctant to "volunteer information that could compromise their economic advantage."[208]

While it is possible to stretch the language of the BWC to include some uses of nanotechnology as biological weapons, one can easily justify the position that these uses are beyond the prohibitions. The only categories of nanotechnology proposed that may possibly fall under the purview of the BWC are the nanodevices that act like other biological weapons and the "artificially created" biological agents and toxins that are exactly like their natural forms. These come closest to the definition of a biological weapon, although as previously stated, doubt exists as to whether they would be considered "living organisms."

204. *Id.*

205. BIOLOGICAL WEAPONS CONVENTION OVERVIEW, *available at* http://www.cdi.org/issues/cbw/bwc.html#difficulties (last visited, May 5, 2004).

206. *Id.*

207. *Id.*

208. *Id.*

In addition, the BWC is riddled with so many loopholes that the exceptions essentially swallow the rule, thus rendering the BWC ineffective. Furthermore, even if such uses were effectively prohibited, the BWC lacks an effective verification and enforcement regime.[209] No method would exist to guarantee that prohibited uses of nanotechnology were not being developed. Absent military action,[210] no one would be able to make sure the rules were being followed. Should a terrorist organization or rogue state develop nanotechnology, regulation under the BWC would not allow for discovery of this development until after the fact.[211]

C. Chemical Weapon Under the CWC?

The CWC is a different story because a higher likelihood exists that specific uses of nanotechnology will fall under its provisions. The CWC defines chemical weapons as "[t]oxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention."[212] This "purposes not prohibited" language is pivotal, and it is where I begin my analysis.

The first subset of non-prohibited purposes includes "[i]ndustrial, agricultural, research, medical, pharmaceutical or other peaceful purposes."[213] The phrase "other peaceful purposes" appears to represent peaceful purposes similar to those purposes listed just before it. This entire group encompasses the full spectrum of regular commercial uses of chemicals—purposes which are allowed under the CWC.

The use of nanotechnology in fabrics and coatings in non-military capacities would fall under either the "industrial" or "other peaceful purposes" and could not be considered a toxic chemical. Nano-sensor systems would also satisfy a non-prohibited purpose if used for research, medicine, or regular commercial activities like tracking cars, boats, or planes. In general, the use of performance-enhancing nanotechnology would comply with this first category of permitted purposes even if developed by the military because it could not be considered a toxic chemical under the CWC since it would not "cause death, temporary incapacitation or permanent harm."[214] Additionally, nano-devices used to cure or prevent diseases, cancers, and other illnesses would fall within the "medical" and "pharmaceutical" purposes.

The next category of permitted purposes includes "[p]rotective purposes, namely those purposes *directly* related to protection against toxic chemicals and

209. *See* Dagen, *supra* note 118.

210. The recent invasion of Iraq is a perfect example of this.

211. This is especially true considering the small amounts of self-replicating nano-devices required to have an efficient program. Note that even when they were parties to the BWC, nations like the Soviet Union/Russia and Iraq continued to develop and possess biological weapons. Dagen, *supra* note 118, at 548 n.88. It seems likely that such deceitful acts will continue with the evolution of nanotechnology.

212. CWC, *supra* note 20, art. II, 1974 U.N.T.S. at 319.

213. *Id.*, art. II, at 322.

214. *Id.*, art. II, at 320.

to protection against chemical weapons."[215] Any product or device created by nanotechnology to defend against chemical weapons would fit under this purpose since its sole function would be protective. However, such a product or device could easily become an offensive weapon but still be allowed under the CWC. Materials using nanotechnology to destroy such agents, even if used by the military, would also fall under the protective purpose provision. However, other nanotechnology-added properties within the same material not directly related to protection against chemical weapons would possibly need to meet another exception, such as those discussed in the paragraphs immediately above and below. Similar devices implanted into the body would also fit under this exception because they have the same defensive and protective quality.

The final category of permitted purposes includes "[m]ilitary purposes not connected with the use of chemical weapons . . . ."[216] Such purposes for nanotechnology include all battle gear, sensors, and other nano-materials used in and on equipment, vehicles, boats, planes, and other similar objects in the military. Along these same lines, any remote-controlled vehicles or combat platforms would qualify under a permitted purpose if they used nanotechnology, as they likely would not be connected with chemical weapons. Additionally, any toxic property that these items may possess likely would not be the reason for harming or killing another.[217] Since these are predominantly conventional weapons and weapons systems, they would not fall under the CWC, which was intended to cover chemical and not conventional warfare. To argue otherwise would be similar to arguing that bullets are toxic because they cause death by interacting with the flesh and bone of a human person. Thus, the use of nanotechnology for conventional weapon purposes would be "permitted" military purposes under the CWC.[218] Additionally, many nanotechnology uses could fit under more than one of these categories, strengthening the argument that they are permitted under the CWC because the exceptions are so broad.

The next question is whether any use of nanotechnology would be viewed as a "toxic chemical" pursuant to the CWC.[219] This classification covers "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals."[220] Certain types of nanotechnologies easily fit under this definition because they naturally interact with their hosts chemically. Relevant uses are the nano-germs and nano-assassins that essentially act like chemical and biological weapons, but are

215. *Id.*, art II, at 322 (emphasis added). This category must be broadly interpreted, including "civilian measures against industrial poisoning and the like, as well as military measures against the use of chemical weapons . . . . Protective military measures, however, must be of a purely defensive character." Cipolat, *supra* note 158, at 409.

216. CWC, *supra* note 20, art. II, 1974 U.N.T.S. at 322.

217. Cipolat, *supra* note 158, at 409.

218. *Id.* (discussing how uses of chemicals for "conventional weapons purposes, such as the production of rocket fuels, explosives, incendiaries or similar generating ammunitions" are permitted military purposes).

219. *See* CWC, *supra* note 20, art. II, 1974 U.N.T.S. at 320 (describing how the CWC defines toxic chemicals).

220. *Id.*

completely man-made as opposed to grown or cultivated. Because the origin and method of production are unimportant,[221] the only remaining issue is whether these types of nanotechnology are "chemicals." While they may not be chemicals in the sense originally conceived of by the CWC drafters, nanotechnology might still be perceived as a *functional* equivalent and thereby covered under the CWC.

One observer has noted that the term "toxic chemical" covers "virtually all chemicals" because any chemical can cause harm or death "provided that its quantity is high enough."[222] This observation misses the point. The drafters had a class of chemicals in mind: chemicals that cause harm or death in small-to-reasonable doses. As such, caffeine should not be viewed as a "toxic chemical" under the CWC just because a high dosage can kill.[223] Despite these concerns, nano-germs and nano-assassins that are similar in nature to a chemical weapon, especially considering the malicious intent behind their function and design, have the greatest chance of being covered by the CWC. It is possible these nanotechnologies could be characterized as a chemical, their interaction with living organisms causing harm or death. These nanodevices could be prohibited as a toxic chemical under the CWC, as they would have no purpose other than causing harm or death to humans or animals.

A more interesting and pressing issue is whether nanotechnology designed to attack and destroy machines or inorganic objects should be considered a chemical weapon. Such technology cannot be considered a toxic chemical because it does not cause "death, temporary incapacitation or permanent harm to humans or animals."[224] While the CWC may apply to inorganic chemicals,[225] this type of technology does not have the requisite effect on living organisms. Because of the broad purposes allowed as exceptions under the CWC's ban, most uses of nanotechnology would not fall within its prohibitions. It seems that something more is needed to protect against the dangers of nanotechnology.

IV.
A New Treaty?

A. *The BWC and the CWC Are Inadequate With Regard to Nanotechnology*

The BWC and the CWC are inadequate as forms of regulation of nanotechnology. In fact, while the CWC is more effective than the BWC in controlling its target weapons, one can argue that both are wholly ineffective as weapons conventions even as to biological and chemical weapons.

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221. *See id.*

222. Cipolat, *supra* note 158, at 401.

223. Almost any everyday chemical (milk, for example) can be applied to this scenario. It seems odd that the CWC was written to cover all chemicals and does not expressly state such a fact. The types of chemicals contemplated by the CWC are those that cause injury by simple contact with living organisms.

224. CWC, *supra* note 20, art. II, 1974 U.N.T.S. at 320.

225. CWC S. Treaty Doc., *supra* note 161, at *64-65.

The BWC was drafted at a time when advanced biological weapons were improbable; they were seen as "unreliable, slow in action, and unpredictable in effect."[226] Today, we know that these views were incorrect. Additionally, because many biological agents are dual-use, creating a verification regime for the BWC is difficult, if not impossible.[227] Recent events demonstrate that the BWC is ineffective in banning biological weapons. In 1992, Russia, a member of the BWC, admitted to violating its provisions.[228] Iraq, another member, is also infamous for its alleged violations of the BWC.[229] These incidents weaken the BWC's effectiveness as a treaty because the treaty relies on an enforcement process—international pressure—that has clearly failed.[230] The BWC cannot even enforce compliance on members that are highly suspected of violating its provisions.

While the CWC is a stronger, more complete weapons treaty than the BWC, it still contains many flaws, and commentators have raised concerns as to the CWC's ability to sufficiently diminish the threat of chemical weapons.[231] The first concern is that the CWC does not extend to terrorist groups; thus, "they are left unrestricted in their capacity to produce chemical or biological weapons."[232] The second concern is that the CWC does not apply to nations that do not ratify its provisions.[233] Such nations can produce and sell chemical weapons without being monitored in their activities.[234] Finally, compliance cannot be fully ensured because military force is not authorized to do so,[235] leaving the parties to the CWC with economic sanctions as their greatest sanction.

The CWC, like the BWC, was not written with nanotech in mind. Therefore, manipulating the language to attempt to fit nanotechnology is inappropriate—and often awkward. First, most uses of nanotechnology cannot fit under the phrase "toxic chemicals and their precursors" in the CWC.[236] Being a toxic chemical is the strongest argument for coverage of nanotech under the CWC for uses like nano-germs and nano-assassins. However, because of the vagueness of the word "chemical," any country can argue that nanotech is not covered under this term and thus not prohibited. Because of this vagueness, the CWC should not be relied on as a regulatory scheme for nanotech. Second, the list of purposes allowed as exceptions under the CWC[237] encompass almost every pre-

226. Paris, *supra* note 110, at 548.

227. *Id.* at 549. An effective verification regime is a daunting task that many will likely not respect or even support because of the vast number of biological agents, coupled with the use of these agents to develop cures.

228. Dagen, *supra* note 118, at 548 n.88.

229. *Id.*

230. *Id.*

231. Matthew Linkie, *The Defense Threat Reduction Agency: A Note on the United States' Approach to the Threat of Chemical and Biological Warfare*, 16 J. CONTEMP. HEALTH L. & POL'Y 531, 552 (2000).

232. *Id.*

233. *Id.* North Korea and Libya are examples of such nations.

234. *Id.* at 552-53.

235. *Id.* at 553.

236. *See* CWC, *supra* note 20, art. II, 1974 U.N.T.S. at 319.

237. *See id.* at 319-20; *see also* notes 172 to 175 and accompanying text.

dicted use of nanotechnology. Even the uses that most closely resemble chemical weapons—namely, nano-germs and nano-assassins—may be classified under one or more of these allowed uses.

Since neither the BWC nor the CWC are effective as they stand, perhaps each may be amended. Under Article XI of the BWC, amendments must be approved by a majority of the members.[238] These amendments, however, do not apply unless a member accepts the amendment.[239] Thus, if a nation or nations do not like the amendment, they will not have to abide by it. Therefore, attempting to amend the BWC would be futile because it would not be automatically binding. As for the CWC, amendments may be made "only through a stringent, formal amendment process requiring the support of a majority of all States Parties with no State Party casting a negative vote, followed by ratification or acceptance by all the supporting States Parties."[240] Again, a member must accept an amendment in order for it to be binding upon that member. Additionally, no member may vote against the amendment. Such a process makes an effort to amend the CWC a futile task.

B. A New Treaty is Necessary

The unique development and characteristics of nanotechnology complicate attempts to fit it within current definitions and classifications.[241] Even though most, if not all, nanotechnologies are not covered by current weapons treaties, it does not follow that outdated documents should be amended to regulate the growth of this spectacular and dangerous technological revolution. Something new is required: a device that accounts for the novelties of nanotechnology while allowing for change as the new technology matures. Proponents and critics of nanotechnology have at least one thing in common: a belief that nanotech needs to be developed in the open and that a wide range of interests must participate in discussions on the future development and use of nanotechnology.[242] The use of currently existing treaties and regulations fail because of the unique nature of nanotechnology. While they *may* be sufficient for the worst types of uses, something is needed to cover all of nanotechnology because so many different possibilities exist for its misuse.

Regulation of nanotechnology will be difficult because of three unique characteristics: invisibility, micro-locomotion, and self-replication.[243] Nanotechnology is unique because it will be the "first complex constructions intentionally engineered to accomplish human purposes at a microscopic (or submicroscopic) level."[244] This property causes problems because of the difficulty of regulating what one cannot see. A jurisdictional problem arises from na-

238. BWC, *supra* note 21, art. XI, 26 U.S.T. at 590, 1015 U.N.T.S. at 168.
239. *Id.*
240. CWC S. TREATY DOC., *supra* note 161, at *40-41.
241. For a useful demonstration of this problem using the distinction between a device and a drug for medical application of nanotechnology, see Fiedler & Reynolds, *supra* note 34, at 607-13.
242. Lin-Easton, *supra* note 29, at 132.
243. SOCIETAL IMPLICATIONS, *supra* note 54, at 214.
244. *Id.*

notechnology's micro-locomotion. The existence of "free ranging nanites" will "radically challenge traditional understandings of macro-boundaries and barriers."[245] Even human skin will be an open space to many nano-devices.[246] Self-replication, although not a necessary property of nanotechnology, may become essential for the "economical production of complex nano-mechanisms in useful quantities."[247] Regulation is of the utmost importance in this area because without it a "population of carelessly designed self-replicating nanites could grow exponentially, without a ready 'off switch.'"[248] With all these elements to consider, the existence of even the simplest nano-device requires a total and complete transformation of "society's current legal and normative structures."[249] Three key areas where regulation of nanotechnology will be particularly difficult are monitoring, ownership, and control.[250] These areas will require most of the focus of regulatory policies.

C. What to Regulate

While more research is required about the dangers associated with nanotechnology, it appears that most uses are harmless and need not be regulated. Perhaps a new nanotechnology treaty can prohibit not only the use of nanotechnology to cause physical or economic harm to living organisms and inanimate objects, but also the development of anything that could possibly do such harm. To enforce this new treaty, an oversight group might be created and given full and complete access to anything they require. A method of recourse can be established if this oversight group reveals any private or commercial information not related to a prohibited act. Penalties sufficiently severe to cause compliance are necessary. Perhaps military action or substantial economic sanctions can serve as inducements. Sanctions under this new regime must be effectively more than a slap on the wrist, even for the United States.

Regarding the types of nanotechnology to be covered under a treaty, most do not likely need to be included. For example, most common products that are merely enhanced with nanotechnology, like materials, computers, and solar panels, need not be included. What should be included are self-assemblers and other forms of nanotechnology that either duplicate themselves or possess the ability to create anything. This is important because universal assemblers might be used to instantly reform existing matter into a batch of terrible toxins. This

245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* All three properties mentioned above will pose novel issues to the ability to monitor nanotechnology. No longer will people be able to "observe all the socially relevant activities in their own surroundings." *Id.* The government must find a way to police nanotechnology without endangering individual privacy—a very difficult balance. New tort actions will likely develop based on trespass where invisible objects enter someone's property, or even his/her person, without consent. *Cf. id.* at 215. Control, as well as responsibility, will be the most important aspects of regulation. The new realm of "nano-space" opens up entire worlds to society, and may leave critical gaps in existing laws.

type of activity is impossible to monitor and prevent. Thus, preemptive constraints must be placed upon these devices so that they are unable to create certain types of products. Additionally, nanotech inventions that involve medicine and drug delivery may have to be heavily regulated because these uses are similar to chemical and biological weapons and can be easily converted to perform prohibited tasks.

The new treaty must also be all-encompassing, covering all groups, countries, and corporations, as well as all situations whether in a time of peace, war, or in between. All the loopholes and gaps left open in treaties like the BWC and CWC must be closed. Additionally, this new treaty may have to be forced upon all nations because if some countries do not sign or are allowed to have "exceptions," the treaty's purpose would be wasted. Coverage must be total or else a nanotechnology arms race will surely result.

D. How to Regulate

An outright ban on nanotechnology is infeasible. Since nanotechnology is already being used and developed, it is too late for a total ban—even if that would be desirable, which it would not be. To quote Professor Reynolds, "[W]hen nanotechnology is outlawed, only outlaws will have nanotechnology . . . . All that a nanotechnology ban will achieve is to ensure that the good guys are at a disadvantage."[251] While a moratorium on nanotechnology research and development is unworkable, the concerns underlying those calls for prohibition are not without merit.[252] However, a total ban on nanotechnology would actually "make things worse since rogue states will then hold a monopoly on a powerful technology, while the civilized world will lack the wherewithal to deploy countermeasures."[253]

That said, the "precautionary principle" of international law may nevertheless require the prohibition of nanotechnology. Although still vaguely defined,[254] the precautionary principle says that "when there is any risk of a major disaster, no action should be permitted that increases the risk."[255] If an action promises both substantial benefits and the risk of major disasters, as is the case with nanotechnology, no balancing of these benefits and risks should occur and the action must be prohibited.[256] This preventative policy arose from "the understanding that scientific certainty is often achieved too late for the development of effective legal policy responses to environmental threats" and

251. Glenn Harlan Reynolds, *Don't Be Afraid. Don't Be Very Afraid: Nanotechnology Worries Are Overblown* (Dec. 6, 2001), *available at* http://www.techcentralstation.com/120601C.html.

252. Glenn Harlan Reynolds, *Forward to the Future: Nanotechnology and Regulatory Policy*, Pacific Research Institute 7, *at* http://www.pacificresearch.org/pub/sab/techno/forward_to_ nanotech.pdf (Nov. 2002).

253. *Id.* at 9.

254. Lin-Easton, *supra* note 29, at 120-21. The precautionary principle is predominantly discussed in international environmental law. *Id.*

255. Freeman J. Dyson, *The Future Needs Us!*, N.Y. REV. OF BOOKS, Feb. 13, 2003 (reviewing MICHAEL CRICHTON, PREY), *available at* http://www.nybooks.com/articles/16053.

256. *Id.* The opposing view (what Dyson calls "libertarian") considers risks unavoidable, with no possible course of action (or inaction) to eliminate those risks. *Id.*

uncertainty should *not* "be used as a reason for delaying measures to prevent environmental harm."[257]

Although the precautionary principle calls for an outright ban on technology, this ban can be lifted if four criteria are met: (1) the proponents of the technology bear the burden of proving its safety; (2) all alternatives, including inaction, must be fully considered; (3) the developers of the technology have a duty to prevent harm; and (4) the development process must be open and informal.[258] The precautionary principle can apply to nanotechnology because it poses a risk of harm to the environment, most notably the "gray goo" problem.[259]

While it would be wise to take into consideration the underlying tenets of the precautionary principle, an outright ban would not be feasible at this time. Alternatively, we cannot leave the development of nanotechnology unabated. A middle ground must be sought where some regulation exists. A regulatory regime over nanotechnology can be neither overly burdensome nor too loose.[260] In the case of the former, unnecessary rules could stunt the growth of nanotechnology or even lead to no growth at all.[261] In the case of the latter, the "lack of necessary rules or vigilance could lead to safety hazards" and potential proliferation.[262] Additionally, too little regulation could block the ability to subsequently develop stricter guidelines while too much regulation would likely create a black market or lead to technology flight.

A moderate regulatory regime should "focus more on preventing deliberate destructive uses than prevention of accidents."[263] Access could be limited, at least for the nanotechnological uses that are deemed dangerous—for example, to licensed professionals or registered researchers.[264] Although extremely difficult because of nanotechnology's inconspicuous nature, export controls could be put in place to prevent its spread to "hostile or irresponsible nation-states" or terrorist groups.[265] Finally, potentially dangerous nanotechnologies could be designed and programmed to be inherently safe.[266] Replicating nano-devices could be developed so that mutations would be difficult or impossible.[267] Additionally, nano-devices could be designed so they would be unable to exist outside of a controlled environment, such as a laboratory.[268]

257. Lin-Easton, *supra* note 29, at 120.
258. *Id.* at 122-23.
259. Ironically, proponents of nanotechnology promise that it will be the best method for cleaning up the environment. *Id.* at 124. It would be a shame to have a process designed to protect the environment actually *prevent* the restoration of that very same environment.
260. Fiedler & Reynolds, *supra* note 34, at 603.
261. *Id.*
262. *Id.*
263. Reynolds, *supra* note 252, at 14.
264. *Id.* As a corollary, the profession of "nanotechnologists" could adopt ethics guidelines, just as lawyers and physicians have, to delineate the expectations and restrictions of the profession. *Id.* This would particularly aid in calming public concern for this potentially dangerous technology.
265. *Id.*
266. *Id.* at 15.
267. *Id.*
268. *See* DREXLER, *supra* note 24, at 258.

Similarities exist between nanotechnology and another recent discovery: biotechnology. While biotechnology is not as small or diverse as nanotechnology, "relatively simple and straightforward rules" have been developed to prevent biotechnology's expected catastrophes.[269] Those guidelines require "the use of organisms that [could not] readily survive outside the laboratory, reasonable containment precautions, and limits on research involving the genetic alteration of particularly dangerous kinds of organisms—human pathogens, for example."[270] Such rules may apply more effectively to nanotechnology because of nanotechnology's increased propensity to elude current regulations and their spheres of coverage.

In fact, such guidelines already exist. The Foresight Guidelines, created by the Foresight Institute in 1999, "are designed to foster safeguards that will protect against accident and abuse, while allowing [nanotechnology] to flourish."[271] The Guidelines are more of a set of recommendations than regulations; thus, they can be amended to conform to experience and scientific knowledge.[272] The underlying philosophy is "first, do no harm."[273]

Some of the important Development Principles contained in the Foresight Guidelines include:

> Artificial replicators must not be capable of replication in a natural, uncontrolled environment.
>
> Evolution within the context of the self-replicating manufacturing system is discouraged.
>
> Any replicated information should be error free.
>
> [Nanotechnology] device design should specifically limit proliferation and provide traceability of any replicating systems.[274]

In addition, the Guidelines contain provisions regarding specific design aspects of nanotechnology.[275] These provisions set forth recommended designs to protect mutation and proliferation as well as provide safety mechanisms that reduce the risk that harmful nanotechnology will be created.[276]

While not perfect, these Guidelines are a start. We should also heed the lessons of the BWC and CWC's flaws. For example, because nanotechnology is still a fledgling industry, a regulatory scheme must be developed quickly before private corporations can unite and protect their intellectual product and competitive edge. Like the pharmaceutical industry with respect to the CWC, nanotech companies should be prevented from implementing a verification and inspection regime to protect their profit margins. If a set of guidelines setting forth protec-

269. Fiedler & Reynolds, *supra* note 34, at 606.
270. *Id.*
271. Reynolds, *supra* note 251, at 2-3.
272. Reynolds, *supra* note 252, at 17.
273. *Id.* This appears at least similar in nature to the underlying philosophy of the precautionary principle, yet it does not go the way of total prohibition. The Guidelines are a more moderate approach.
274. Reynolds, *supra* note 29, at 10687.
275. *Id.* at 10688.
276. *See id.*

tions and threats can be effected, then perhaps a weapons convention that serves as more than a formal declaration of intent may be established.

CONCLUSION

As K. Eric Drexler stated, nanotechnology can "bring the ultimate tools of destruction," but it is not inherently dangerous.[277] With proper guidance, Drexler predicted we could use nanotechnology to "build the ultimate tools of peace."[278] Although the benefits of nanotechnology tempt one to allow it to grow unrestricted, we must take heed of the potential risks such a powerful tool promises. Since almost anything can be built—and matter can be almost completely controlled—if nanotechnology lives up to its reputation, it seems obvious to conclude that nanotechnology must be regulated. But how?

Current treaties such as the BWC and CWC are inadequate because they are outdated and were drafted without a major development like nanotechnology in mind. Institutions like the BWC and CWC are already set and cannot be easily adapted to accommodate new advances in technology. In addition, the uses and purposes of nanotechnology are expected to be so diverse that existing regimes cannot properly discern harmful from helpful uses.

A new regulatory system must be set up with all potential uses in mind so that the advantageous uses can come to fruition while the harmful uses can be prevented and proscribed. Because this regime will be adopted *before* the technology fully takes off, it does not have to worry about already existing intellectual property rights or privacy concerns. It will take a "create at your own risk" type of approach that can disregard trivial concerns and focus on safety measures and the proper maturation of the technology. Thus, if a new treaty can be crafted having learned the lessons from the deficiencies of the BWC and CWC, it should be able to handle nanotechnology however, whenever, and wherever it develops.

277. DREXLER, *supra* note 47, at 239.
278. *Id.*